DOCUMENT RESUME

ED 256 645 SO 016 336

AUTHOR Kopecky, Frank J., Ed.; Wilkin, Rebecca S., Ed.
TITLE Current Illinois Legal Issues. Second Edition.
INSTITUTION Sangamon State Univ., Springfield, Ill.
PUB DATE Jan 83
NOTE 65p.; Contains random articles reprinted from "Illinois Issues" (December 1977-February 1982), published by Sangamon State University.
AVAILABLE FROM Illinois Issues, K Building, Sangamon State University, Springfield, IL 62708 ($4.95, plus $1.00 postage and handling).
PUB TYPE Collected Works - General (020) -- Guides - Classroom Use - Materials (For Learner) (051)

EDRS PRICE MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS Constitutional Law; *Controversial Issues (Course Content); Court Judges; Courts; Criminal Law; *Justice; *Legal Education; *Legal Problems; Secondary Education; *State Courts; State Government
IDENTIFIERS Equal Rights Amendment; *Illinois; Juries; *Law Related Education

ABSTRACT

Designed as supplementary reading in American government or social studies courses, this compilation of articles is intended to help students gain a better understanding of the judiciary's role in the Illinois legal system. The first of three sections contains articles about judges and the court system. The second section examines the criminal justice system. including the grand jury, criminal sentencing, the problem of court backlog, and crowded prisons. The third section is devoted to issues that have recently been debated in the Illinois political system. Articles included are: "Should Judges Be Elected or Appointed?" (Frank Kopecky); "Illinois Judges: Too Much Retention and Too Little Selection" (Paul Lermack); "Illinois Trial Judges: Pragmatic Fact Finders" (Stephen Daniels, Rebecca Wilkin, and James Bowers); "The Illinois Appellate Court: The Wheels of Justice Grind Exceeding Slow" (Janeen Burkholder); "Cameras in the Courtroom: Will Illinois Be Next?" (Mike Strand); "The Grand Jury System" (Ed Nash); "Justice Delayed: Illinois and Its Speedy Trial Act" (Marilyn J. Rice); "Analyzing Class X under the U.S. and Illinois Constitutions" (David F. Schwartz); "An Inequity in Sentencing Law" (James K. Zerkle); "No Room behind Bars" (John F. Boyle); "The Chain Gang and ERA's Bitter End (Diane Ross); "'Scientific Creationism' Challenges Theory of Evolution" (Julie A. Dutton); "Gun Control: Moving to the Home Front" (John J. McCarthy); "New Open Meeting Law: Visions and Revisions" (Dona Gerson); "Remapping: The Decennial Poker Game" (Diane Ross); and "Look-Alike Drugs" (Julie A. Dutton). (LH)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED256645

Current Illinois Legal Issues

Editors:
Frank J. Kopecky and Rebecca S. Wilkin

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

This document has been reproduced as received from the person or organization originating it.

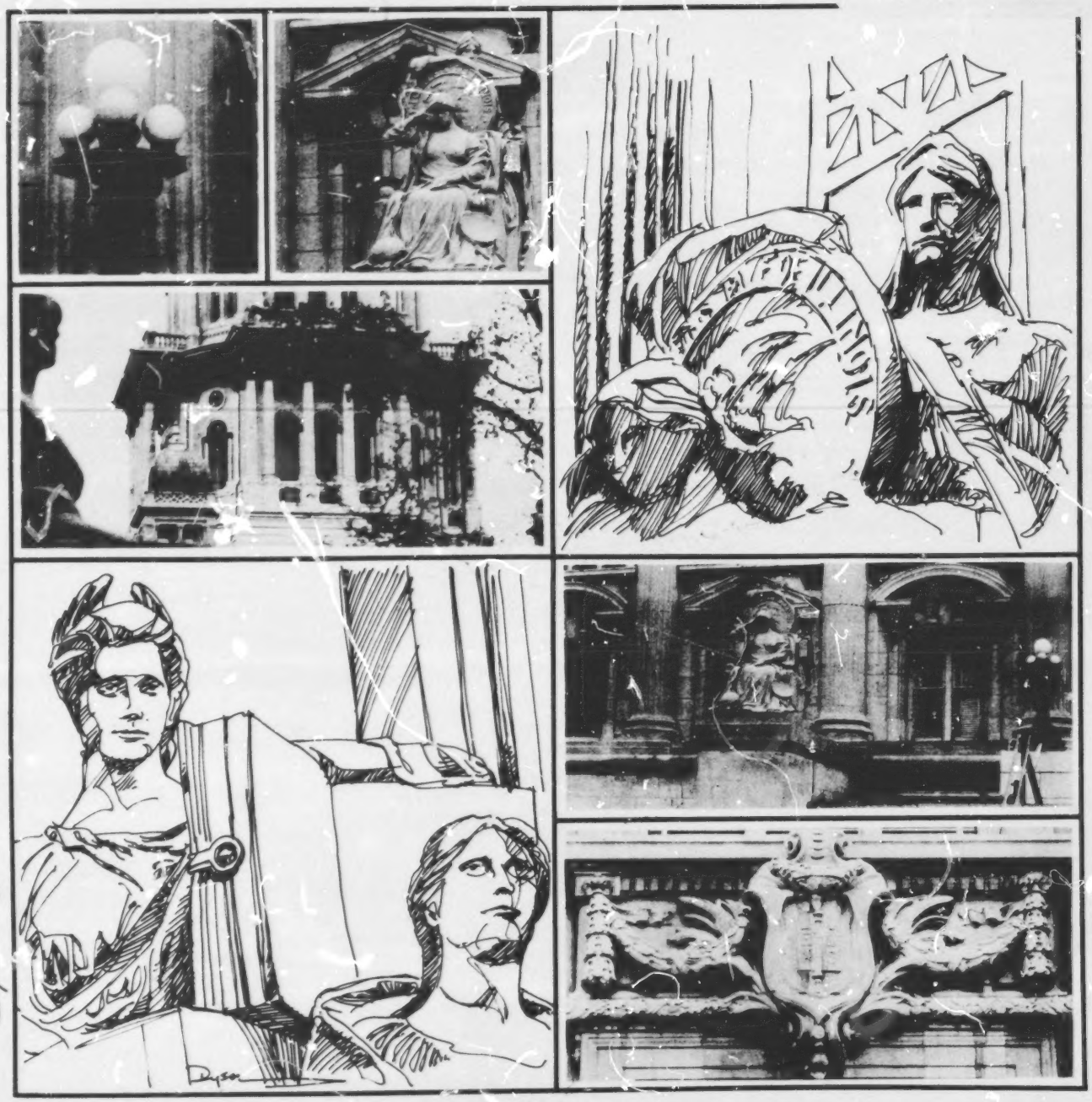
Minor changes have been made to improve reproduction quality.

Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

"PERMISSION TO REPRODUCE THIS MATERIAL IN MICROFICHE ONLY HAS BEEN GRANTED BY

J. Michael Lennon

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."



SP 016 336

Other Publications from *Illinois Issues:*

Water Resources in Illinois: The Challenge of Abundance, 1983

Illinois Elections, Second Edition, 1982

Breadbasket or Dust Bowl? The Future of Illinois Farmland, 1982

Illinois Issues Special Report: The Cutback Amendment, 1982

Housing Issues in Illinois, 1981

Illinois Issues Annual, 1978-79

Illinois Issues Annual, 1977-78

Illinois Issues Annual, 1976-77

Illinois Issues Annual, 1975

How to order more copies of this book

Orders should be sent to:
ILLINOIS ISSUES
K Building
Sangamon State University
Springfield, Illinois 62708

Standard bookstore discounts are available. Instructors receive free desk copy upon request. $4.95 each, plus $1.00 for postage and handling.

For information on other publications and subscriptions to *Illinois Issues*, write to the above address or call 217/786-6084.

Current Illinois Legal Issues

Second Edition

Edited by FRANK J. KOPECKY and REBECCA S. WILKIN
Contributing Editors:
J. MICHAEL LENNON
CAROLINE A. GHERARDINI

Articles reprinted from *Illinois Issues* dealing with law and the court system with an introduction by Frank J. Kopecky, director of the Center for Legal Studies, Sangamon State University

Published by *Illinois Issues* and Center for Legal Studies Sangamon State University Springfield, Illinois 62708

January 1983

Illinois Issues is published by Sangamon State University, the Public Affairs University of the State of Illinois, and cosponsored by the University of Illinois

Illinois Issues

Established 1975

ILLINOIS ISSUES is published by Sangamon State University. The magazine's board is appointed by the presidents of Sangamon State University and the University of Illinois. In addition to subscription income, the magazine is supported by grants from the Illinois Humanities Council, The Joyce Foundation, the U.S. Department of Energy, the Ancel Charitable Trust; support from the University of Illinois and Sangamon State University; and donations. The contents of the magazine do not necessarily reflect the views of the grantors, either university or donors.

Publisher: J. Michael Lennon. *Editor:* Caroline Gherardini. *Circulation and advertising manager:* Elizabeth A. Curl. *Editor emeritus:* William L. Day. *Associate editors:* Margaret S. Knoepfle, Richard J. Sherrill, Larry Smith. *Assistant editors:* Patricia Bartle-McCredie, John G. Martin. *Legislative correspondent:* Diane Ross. *Contributing editors:* Tom Littlewood, Bill Miller, Robert Kiechhefer, Milton Rakove, Ed McManus, Anna J. Merritt, Robert Mackay, James Krohe Jr., Barbara J. Hipsman, Bob Springer. *Capitol Commentary Editor:* Melinda F. Kwedar. *Graduate assistant:* Marian L. Heid. *Business staff:* Bonnie S. Roberts. *Student assistants:* Harry T. Bostick, Wendy A. Hall, Jan R. Martz, Mark Thornton.

THE BOARD

Chairman: **Samuel K. Gove**, director, Institute of Government and Public Affairs, University of Illinois, Urbana. *Vice Chairman:* **James R. Kackley**, partner, Arthur Andersen & Co., Chicago. *Members:* **Louis Ancel**, attorney, Chicago. **David E. Connor**, Commercial National Bank of Peoria. **William L. Day**, *editor emeritus*, Springfield. **Harold L. Deakins**, public affairs manager, Illinois Power Company, Decatur. **Robert P. Ewing**, chairman of the board and president, Bankers Life & Casualty Co., Chicago. **James M. Furman**, executive vice president, MacArthur Foundation, Chicago. **Doris B. Holleb**, director, Metropolitan Institute, University of Chicago. **Michael J. Howlett**, partner, Howlett & Perkins Associates, Chicago. **Michael H. Hudson**, vice president, public affairs, Illinois Tool Works Inc., Chicago. **David Kenney**, director, Illinois Department of Conservation, Springfield. **Louis H. Masotti**, professor of political science and urban affairs, Northwestern University, Evanston. **Odas Nicholson**, judge, Cook County Circuit Court. **James D. Nowlan**, director, Public Administration Program, University of Illinois, Urbana. **James T. Otis**, lawyer, Chicago. **Theodore Peterson**, professor of journalism, University of Illinois, Urbana. **Betsy Plank**, assistant vice president, Illinois Bell Telephone Co., Chicago. **Carl Shier**, international representative, Region 4, United Auto Workers. **Honorable William G. Stratton**, vice president, Canteen Corporation, Chicago. **Thomas F. Roeser**, vice president-government relations, The Quaker Oats Company, Chicago. **James M. Wall**, editor, *Christian Century*, Chicago. **Samuel W. Witwer**, lawyer, Chicago. **James C. Worthy**, professor of management, Northwestern University. **J. Michael Lennon**, *ex officio member.*

• Copyright 1983 by Sangamon State University, Springfield, Illinois 62708
All rights reserved including the right to reproduce this book in any form.
Printed in U.S.A

BEST COPY AVAILABLE

Contents

Introduction *By Frank J. Kopecky* ____ 2

Bibliography ____ 6

I. Courts
Should judges be elected or appointed? ____ 7
By Frank Kopecky
Illinois judges: Too much retention and too little selection ____ 11
By Paul Lermack
Illinois trial judges: pragmatic fact finders ____ 15
By Stephen Daniels, Rebecca Wilkin and James Bowers
The Illinois Appellate Court: The wheels of justice grind exceeding slow ____ 20
By Jansen Burkholder
Cameras in the courtroom: Will Illinois be next? ____ 24
By Mike Strand

II. Criminal Justice
The grand jury system ____ 28
By Ed Nash
Justice delayed: Illinois and its Speedy Trial Act ____ 31
By Marilyn J. Rice
Analyzing Class X under the U.S. and Illinois constitutions ____ 36
By David F. Schwartz
An inequity in sentencing law ____ 38
By James K. Zerkle
No room behind bars ____ 40
By John F. Boyle

III. Current Legal Issues
The chain gang and ERA's bitter end ____ 43
By Diane Ross
'Scientific creationism' challenges theory of evolution ____ 44
By Julie A. Dutton
Gun control: moving to the home front ____ 46
By John J. McCarthy
New open meetings law: visions and revisions ____ 52
By Dona Gerson
Remapping: the decennial poker game ____ 56
By Diane Ross
Look-alike drugs ____ 58
By Julie A. Dutton

Introduction

By FRANK J. KOPECKY

Since its first issue in January 1975 *Illinois Issues* has published many articles dealing with law and the courts. It is not surprising for a political magazine such as *Illinois Issues* to emphasize law, for it is difficult, if not impossible, to separate law from politics. Law is the end product of the political system. In many ways, previous years' political battles often become current law. For example, the issue of raising the drinking age was a hotly debated issue in the Illinois General Assembly during 1979. It is now part of Illinois law. While most people have a basic understanding of the legislature's role in the lawmaking process, not many are familiar with the judicial lawmaking function and the procedures followed in the judicial branch of government. The purpose of this book is to help the reader gain a better understanding of the judiciary's role in the Illinois legal system.

This is the second edition of *Current Legal Issues.* The majority of the articles in the book were selected from among those published in *Illinois Issues* over the past four years. A few articles of continuing interest from the previous edition (1978) are also included. The articles were selected because they explain the court system, the criminal justice process and some of the current issues which are related to the legal system. The brief introductory section has been added to provide some background information on law and the court system in Illinois. This introduction and the following articles are not meant to be a basic text on the judicial system. In order to keep the introduction short, many details on the legal system have been omitted. The collection is designed for use as supplementary reading in an American government or social studies course, but it should also be of value to anyone interested in Illinois legal issues and processes.

One of the best ways to learn about the law is to examine legal issues in the context of current events. In this way legal issues can be studied and discussed as real issues — not abstract concepts. Such an approach allows students to better understand the political process as well as the legal-judicial process and how the two are related. Legal issues become dynamic when studied along with the political debate, rhetoric, compromise and personalities that accompany them in real life. Frequently students can follow the debate from beginning to end and discover how decisions are reached through the political process. The law affects

every area of our lives and we will be better prepared as citizens if we understand how its processes work and what its terms mean.

One effective method of using these materials in the classroom is through a mock courtroom debate. The class can be divided into three groups: The first group are the "plaintiffs" who would like to see a change in the law. The second group are "defendants" opposed to the change and the third group are the "judges" who are uncommitted. Those in favor of change present their arguments first; those opposed argue next. The judges decide the issues. The assignment can be expanded to include extra research, the preparation of written arguments ("briefs") and the presentation of oral testimony by "expert witnesses." The judges could be required to write written papers ("opinions") explaining their decisions. One of the advantages of the debate format is that the teacher can remain neutral and switch from side to side to keep the debate going.

The articles selected for this book are divided into three categories. The first section consists of articles about judges and the court system. In addition to providing general information about the courts, issues such as the most appropriate manner of selecting judges and the nature and quality of the judiciary are raised. The second section examines the criminal justice system. It consists of articles on the grand jury, criminal sentencing, the problem of court backlog and Illinois' crowded prisons. The third section is devoted to issues which have recently been debated in the Illinois political system. The articles were selected either because the issues have reached the courts or may ultimately be decided in the court system. These articles can provide the basis for lively discussion and debate.

Nature of law

Law may be defined as the body of rules enacted by the governmental entities of a society which govern the activities of the members of that society. It controls the relationships between individuals in society and between individuals and the government. Law in a democratic society should reflect the wishes of a majority of citizens. In this country there are three principal lawmaking institutions — the legislature, the executive and the judiciary. It is clear that legislatures, whether they are state general assemblies, city councils or the U.S. Congress, create law. Executive agencies, as a result of powers delegated to them, make rules and regulations. The law regulating administrative agencies is known as administrative law. This area of the law is expanding rapidly. Courts also make law by deciding cases. In deciding cases, judges not only resolve disputes between individuals who appear before them, they also create precedents which may be followed by other judges. If enough judges follow the precedent, it becomes a part of what is called "common law." The practice whereby one judge follows another judge's decision is known as the doctrine of *stare decisis* (the decision before). Judges also make law by interpreting laws ("statutes") and constitutions.

Illinois court system

Illinois has a hierarchical court system. There are three levels of courts: the trial court, the intermediate appellate court and the supreme court (see chart on page 5). Several states have a similar three-level system while the other remaining states have a two-level system consisting of a trial level and a supreme court. In Illinois virtually all cases begin at the trial level. At the trial level evidence is heard and witnesses are called. If there is an error made at the trial level, the case may be appealed. In appellate practice no witnesses are called and no new evidence is heard. The case is decided on the basis of the trial court record and oral or written arguments of attorneys for both sides.

The civil court process

Both the civil and criminal courts of this country use adversary proceedings. Each side is allowed to give its version of the facts, produce favorable witnesses, present legal arguments and challenge the other side's case. The party who begins the lawsuit is called the "plaintiff," and the party against whom the action is brought is called the "defendant." The plaintiff's first step is to choose a court with jurisdiction, that is, the legal power to hear the case. The plaintiff then files a complaint outlining the nature of the suit and naming the defendant. The court notifies the defendant and the lawsuit is on its way. This notification is usually done by a document known as a "summons."

The defendant has a number of options after notification. He may admit to the complaint and settle out of court. He may take no action ("default"), in which case the court will enter a judgment in favor of the plaintiff. The defendant may also file an "answer," which states his position on the plaintiff's complaint. Finally, the defendant may file a "counterclaim." The legal papers filed in the court are known as "pleadings."

Either the defendant or the plaintiff may file a "motion to dismiss" after both their pleadings have been submitted to the court. The "motion to dismiss" challenges the legality of a pleading, not the facts contained in the pleadings. The judge then rules on the issues raised without a trial. Cases in which the facts are disputed generally bypass this method and go to trial either by jury or judge without a jury.

Modern trial courts have virtually eliminated the Perry Mason-type element of surprise in jury trials. The idea behind the modern code of legal procedures is that both sides should be as fully informed on the opposition's case as possible. Truth and justice are better served if both sides are informed about the opposition's facts and arguments. "Pre-trial conferences" between the judge and opposing attorneys serve this purpose by clarifying issues and establishing facts which are not in dispute. "Discovery" procedures also aid in eliminating surprise. Through "discovery," parties may request information about the case which the other side possesses. Lists of witnesses and statements of witnesses may also be obtained.

If the suit involves what is essentially a question of law, rather than fact, the trial will probably be held

before a judge only. If facts are disputed, the suit may be heard before a jury. Lawyers representing both parties choose the jury. Once the jury has been selected, each attorney makes an opening statement summarizing what he or she intends to prove during the trial. During the trial, both parties are allowed to call witnesses and cross-examine those of the opposition. When this is completed, each attorney makes a final statement to the jury to persuade them to decide in favor of his or her client.

The judge summarizes the evidence that has been presented and explains the law or laws that apply to the jury. Then the jury retires to decide its verdict. The final decision of the court is called a "judgment."

The party which loses on the trial level may appeal to a higher court if an error has been made by the trial court. The appellate court does not stage another trial, but simply reviews the record or transcripts of the trial court to determine the legality of the trial court's decision. If the appellate court disagrees with the law as applied by the trial court, it can reverse or modify the trial court's judgment and render its own. Alternatively, the appellate court may order that the case be returned ("remanded") to the trial court for further hearing. The appellate court generally will not reverse or modify a trial court's decision if the issue on appeal involves only an interpretation of facts heard by the trial court.

The criminal court process

A criminal case generally enters the court process after the police arrest a person accused of violating a law. The "prosecution" (attorney representing the state) then files a complaint. Both police and prosecutors exercise a great deal of discretion at the primary stages and many accused offenders are released.

In criminal cases, the prosecutor gathers evidence, sometimes calling upon the investigative powers of local or state police in order to demonstrate that the accused is guilty as charged. As in civil cases, discovery rules apply and the prosecutor must disclose all evidence including that which is beneficial to the defense.

After arrest, the defendant is brought before a judge for hearing. This initial hearing is commonly known as an "arraignment." The court advises the defendant of the charges and of his rights and sets "bail." Bail is an amount of money which is deposited with the court to assure that the defendant will appear for trial. It is forfeited if the defendant does not appear. The court must set bail in all cases except those which are punishable by death. Bail is generally very high for serious crimes.

At a criminal trial the state attempts to demonstrate that the defendant violated a law and deserves punishment. The defendant is presumed innocent until proven guilty and the court must follow a prescribed set of rules. Unless he knowingly waives the right, the defendant must be represented by legal counsel. Innocence or guilt is determined by a jury of the defendant's fellow citizens, unless the right to a jury trial is waived.

In "felony" cases (more serious crimes), the defendant comes before a judge for a preliminary hearing to determine if there is probable cause to go to trial. If so, the judge sets a trial date. The prosecution may, in some instances, use a "grand jury." The grand jury, composed of 23 citizens chosen randomly from voter registration lists, decides whether probable cause exists to believe that the defendant has committed a felony.

At any time during the criminal process, the prosecution and the defendant may attempt to "plea bargain." This is an agreement between the prosecution and defense whereby the defendant agrees to plead guilty to a lesser charge in exchange for a lighter sentence. Nationally, more than 90 percent of criminal cases are settled in this manner.

The trial begins with opening statements by both the defense and prosecution. Then each side is allowed to call and question witnesses and cross examine each other's witnesses. After both the prosecution and defense have presented their cases, each makes a closing argument to the jury. At this time, the judge instructs the jury as to what law applies and explains what the law means. The jury then retires to a private jury room to formulate a verdict. The decision must be unanimous.

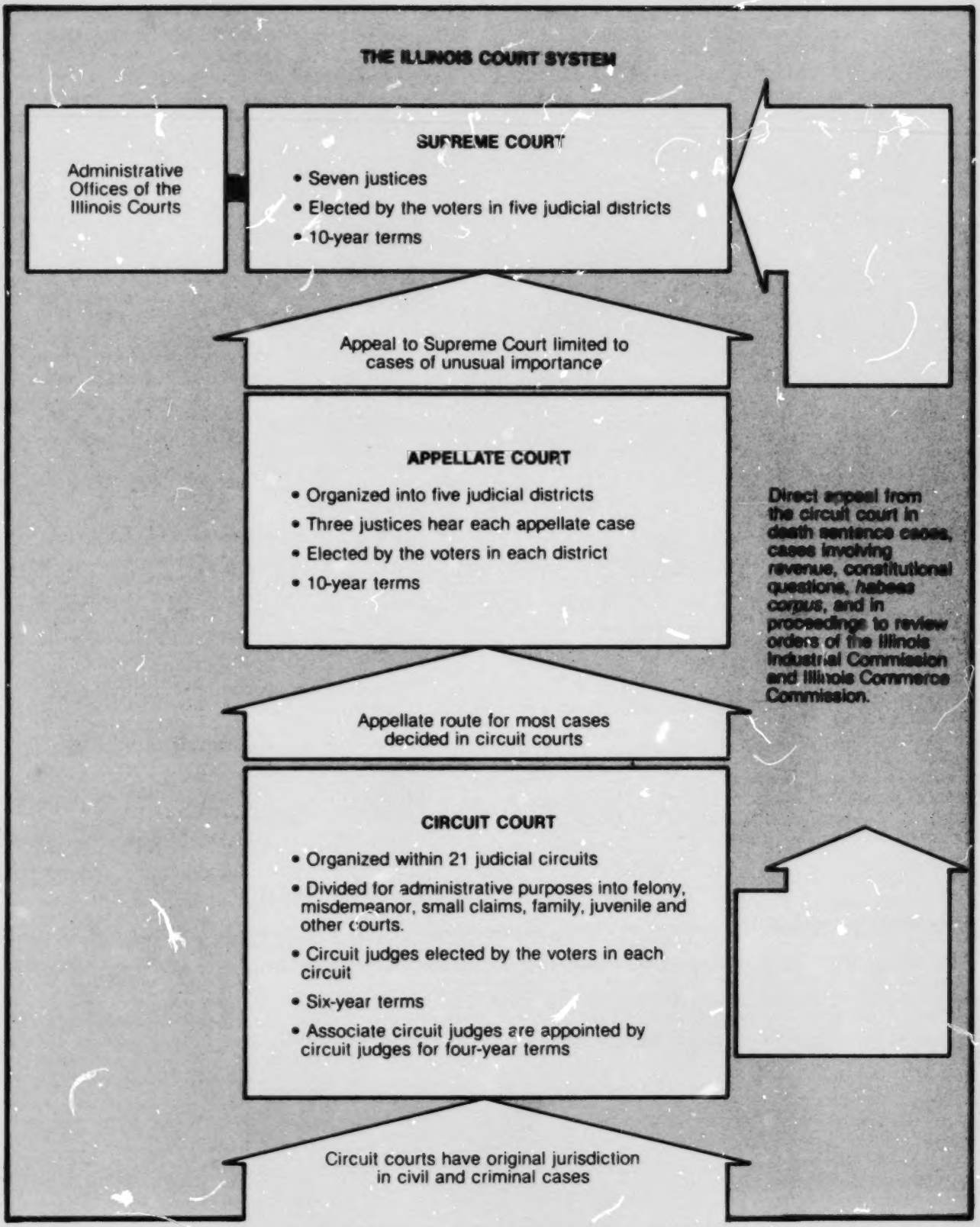
Generally, the final step in the criminal court process is sentencing. The judge has the power to sentence the defendant within the minimum and maximum limits set by the criminal code for the crime in question. A probation officer supplies the judge with a presentence report outlining the defendant's personal and family background, prior record, education and employment. The report also makes a recommendation on how good a risk the defendant would be on probation. As in civil cases, there is a right to appeal.

Probation is the most frequently imposed sentence. The convicted offender is released under the supervision of a probation officer for a period of time set by the court. Violation of probation (which may include leaving the state, quitting a job, using drugs or an excessive amount of alcohol) may mean commitment to prison to serve the original sentence.

Law-related education

This book will have served its intended purpose if it increases the reader's knowledge and interest in legal issues which are currently being debated in our political system. This book can be used as a curriculum tool to incorporate law-related education into the classroom. Many schools have adopted law-related education materials as components of existing courses or have developed new courses devoted exclusively to law. A variety of law-related educational materials have been developed for use in the college, secondary, and elementary classrooms. A selected bibliography of law-related educational materials is included at the end of this section.

Law-related education can help students to become more aware and knowledgeable citizens. It introduces basic concepts related to law and legal institutions. Law-related education also streses the relationships of law to society as a whole. In addition, the use of legal issues promotes critical thinking by examining conflicting points of view and showing that conflict and conflict resolution are a normal part of society. Discussion of legal issues provides an excellent format for developing value clarification and awareness of issues facing society.


THE ILLINOIS COURT SYSTEM
Administrative Offices of the Illinois Courts
SUPREME COURT
• Seven justices
• Elected by the voters in five judicial districts
• 10-year terms
Appeal to Supreme Court limited to cases of unusual importance
APPELLATE COURT
• Organized into five judicial districts
• Three justices hear each appellate case
• Elected by the voters in each district
• 10-year terms
Direct appeal from the circuit court in death sentence cases, cases involving revenue, constitutional questions, habeas corpus, and in proceedings to review orders of the Illinois Industrial Commission and Illinois Commerce Commission.
Appellate route for most cases decided in circuit courts
CIRCUIT COURT
• Organized within 21 judicial circuits
• Divided for administrative purposes into felony, misdemeanor, small claims, family, juvenile and other courts.
• Circuit judges elected by the voters in each circuit
• Six-year terms
• Associate circuit judges are appointed by circuit judges for four-year terms
Circuit courts have original jurisdiction in civil and criminal cases

Also see map on page 22 showing districts and circuits of Illinois courts.

Law-related education projects are supported by many groups including bar associations, law schools, judicial organizations and educational units. Information and resource materials on law-related education can be obtained from the following sources:

Committee on Law-Related Education for the Public
Illinois Bar Center
Springfield, Illinois 62701

Special Committee on Youth Education for Citizenship
American Bar Association
1155 East 60th Street
Chicago, Illinois 60637

Responsibility Education
Illinois State Board of Education
100 North First Street
Springfield, Illinois 62777

Constitutional Rights Foundation/Chicago Project
Room 1854
122 South Michigan Avenue
Chicago, Illinois 60603

Chicago Street Law Project
Loyola University School of Law
One East Pearson
Chicago, Illinois 60611

Selected Bibliography

Administrative Office of the Illinois Courts *Annual Report to the Supreme Court* of Illinois, Springfield, Ill.: Administrative Office of the Illinois Courts, annual.

This work provides a one-year overview of the court system in Illinois. It includes caseload statistics, lists of judges, information on judicial elections and assorted maps and graphs relating to the Illinois court system.

American Bar Association Special Committee on Youth for Citizenship. "Update on Law Related Education." Chicago: American Bar Association.

This periodical presents important developments in the law, curriculum materials and teaching strategies, and news in law-related education. Published three times a year.

Cohn, Rubin. *To Judge with Justice: History and Politics of Illinois Judicial Reforms.* Urbana, Ill.: University of Illinois Press, 1973.

Cohn analyzes the political, professional and personal influences which produced the judicial article of the 1970 Constitution. He also gives a brief historical review of the constitutional provisions prior to the 1970 convention.

Coughlin, George. *Your Introduction to Law.* New York: Barnes & Nobel (2nd ed.), 1975.

This book contains practical information about the courts and legal problems in everyday life with charts and glossary.

Crane, Edgar G., ed. *Illinois Political Processes and Governmental Performance.* Dubuque, Iowa: Kendall/Hunt Publishing Co., 1980.

Chapter 9, "The Illinois Judicial System" by Stephen Daniels and Frank Kopecky, gives an overview of the judicial process and structure in Illinois.

Fiedler, George. *The Illinois Law Courts in Three Centuries 1673-1973: A Documentary History.* Berwyn, Ill.: Physicians Record Company, 1973.

Fiedler traces the history of Illinois courts from the 17th century to the 1970s. Included are reprints of original documents concerning the establishment and functions of the Illinois courts.

Fischir, Louis, David Schimmel and Cynthia Kilby. *Teachers and the Law: A Guide for Educators.* New York: Longman, Inc., 1981.

This is a teacher's guide to incorporating law into the classroom.

Gerlach, Ronald A. and Lynne W. Lamprecht. *Teaching About the Law.* Cincinnati, Ohio: W. H. Anderson, Inc., 1975.

This book provides a complete overview of law-related education including its history, curriculum materials, use of community resources and use of legal reference material.

Illinois Blue Book. Published by the State of Illinois.

Outlines the Illinois court system in one chapter. It includes supreme and appellate court biographies and sections on the court administrative office, circuit courts and court of claims.

Kenney, David. *Basic Illinois Government: A Systematic Explanation.* Carbondale, Ill.: Southern Illinois University Press, 1974, Chapter 6, "The Judicial Branch."

Kenney gives an overview of the structure and processes of the Illinois court system. He also includes a brief history of judicial reform in Illinois.

Jacobstein, J. Myron and Roy M. Meisky. *Legal Research Illustrated.* Mineola, New York: Foundation Press, Inc. 1981.

This book provides an informative introduction to basic legal research.

Ross, Martin. *Handbook of Everyday Law.* 4th ed. New York: Harper and Row, 1981.

This book summarizes aspects of the law that touch our daily life including contracts, wills, real estate and taxes. A glossary is included.

Statsky, William P. *Legal Research, Writing and Analysis: Some Starting Points.* St. Paul: West Publishing Co., 1974.

This paperback book gives the reader a complete introductory text on finding legal materials.

By FRANK J. KOPECKY

Reprinted from *Illinois Issues*, December 1977

The lingering debate on merit selection

Should judges be elected or appointed?

THE QUESTION of whether to elect or appoint judges has had a long and turbulent history in Illinois. Three times in the last 20 years the voters of the state have been asked to vote on constitutional proposals altering the judicial selection process. And the debate isn't over. There are several proposals currently before the Illinois General Assembly which, if enacted, would change the selection method. Proponents of the present elective system are fighting to keep the public directly involved in choosing their judges. Opponents of this method have proposed that judges be selected by a merit plan in which a commission nominates candidates and presents a list for executive appointment.

The issue of judicial selection cuts to the very heart of our national democratic tradition. On one hand, there is a recognition that justice must be administered impartially. Judges must be selected because of their ability as jurists, not simply because of their political affiliations. A judge in deciding a case must be governed by principles of law and the merits of the litigant's case, not the litigant's political position. On the other hand, under our common law tradition, judges, particularly appellate judges, decide cases which become law. Judges are given immense power in this country — power to interpret statutes, review administrative decisions and declare legislative and executive actions unconstitutional. The fact that judges often decide issues of tremendous significance to the general public means that the public *must* retain some control over the judiciary. Actually voting for judges is one means by which the public can exercise this control.

FRANK J. KOPECKY
Director of the Center for Legal Studies at Sangamon State University, he is an attorney. The author acknowledges Mariann Pogge, graduate assistant for the center, for her research assistance.

The root of the selection problem stems from the belief that it is possible to separate law from politics. Law is related to politics as trees are to a forest. It is possible to separate the two, but the result is a pile of dead wood and a barren field. Law grows out of politics; it is the end product of the political system, and the two cannot be separated. Nevertheless, even the most ardent advocate for democratic institutions recognizes that a court of law must be governed by a different set of rules than those which govern the legislative or the executive branches of government. A judge must transcend partisan politics and must definitely strive for justice in reaching a decision. A judge must not be governed by what may be the passing whim of the body politic. Judges have traditionally served as a check on the transient impulses of the legislature or the executive. The crucial factor in choosing a judicial selection process is not to eliminate politics, but to control politics. The issue is simply this: What is the proper blend of political influences and who or what group should exercise the political power to select judges?

Methods of selection

The two basic methods used in the selection of judges in the United States are election and appointment. Elective methods may be either partisan or nonpartisan. In partisan elections the judicial candidate is nominated by a party and runs with a party identification. In nonpartisan elections the judicial candidate is generally nominated in a nonpartisan primary and runs in the general election without a party label. Appointment methods used in other states differ on where the responsibility rests for the important decisions; they are made either by the governor, the legislature or a judicial nominating comission. The method which uses the judicial nominating commission is generally referred to as merit selection or the Missouri plan. (Missouri in 1940 became the first state to adopt the judicial nominating commission system.) Most states use a combination of elected and appointed systems. For example, Missouri uses merit selection for its state appellate and supreme court judges and its trial judges in the counties of St. Louis, Jackson (Kansas City), Clay and Platte, but election is used to select trial judges in the rest of the state. Executive and legislative appointment plans are popular principally among the original 13 states. In many of these states appointments by the governor must have the advice and consent of at least one of the houses of the state legislature.

The federal judiciary is selected by executive appointment. The president makes all judicial appointments with the advice and consent of the Senate, but significant roles are played in the selection process by the senator of the president's party from the state in which the vacancy exists, the Justice Department and the American Bar Association. President Jimmy Carter has taken the first step in selecting U.S. judges on merit by establishing the U.S. Circuit Court Judge Nominating Commission to propose candidates for the U.S. Court of Appeals.

New states admitted to the Union in the early 1800's generally adopted a system of electing judges. The election of judges was consistent with the theories of Jeffersonian Republicanism and Jacksonian Democracy which prevailed during the period. Judges ran for election and retention in partisan elections. Following the Civil War and

the rise of urban political organizations, the popularity of choosing judges by partisan election began to wane. Reformers began advocating the selection of judges through nonpartisan elections. Judges would run in primaries without party labels, and the two with the highest vote in the primary would stand for election in the general election. This movement gained some degree of popularity, and the nonpartisan election is now used in 17 states including Michigan, Minnesota and Wisconsin.

In recent years there has been a decisive, if not overwhelming, trend toward the use of the merit selection or the Missouri plan. According to the American Judicature Society, a citizens group formed to promote court reform, 27 states now select a portion of their judges through a merit selection process. No state has changed to any plan other than merit selection during the last 25 years.

A merit selection plan generally has three key elements: (1) a list of qualified candidates (usually three) developed by a nonpartisan judicial nominating commission made up of lawyers and nonlawyers; (2) appointment of the judge by the governor from the list developed by the nominating commission; (3) a short probation period for the judge followed by a retention election in which the judge has no opponent but must receive enough "yes" votes to be retained.

The major variation in merit selection states is found in the membership of the nominating commission. In some states the majority of the commission is made up of lawyers; in others nonlawyers constitute the majority. The number of commission members selected by the governor or bar associations also varies. In Missouri the nominating commission for appointing trial judges consist of two lawyers elected by lawyers who practice in the district, two nonlawyers appointed by the governor, and the presiding judge of the appellate court which hears appeals from the trial court. In theory, these members vigorously screen candidates and nominate three qualified individuals to the governor, who must appoint one of the three. The makeup of the commission is designed to represent the interests of the bar through the lawyers, the judiciary through the appellate judge, and the general public through the members appointed by the governor. Because of his ability to pick one out of the three candidates nominated, the governor has a significant role in the selection process.

Proponents of merit selection contend that higher quality judges who have greater independence are placed on the bench through merit selection. The qualifications of judicial candidates are thoroughly reviewed by a panel whose members have the expertise necessary to evaluate those characteristics of a good judge. It is also contended that lawyers with exceptional judicial talents are more likely to seek judicial office through this nominating process than through a political nominating process. Lawyers would no longer have to spend years developing political support within the party in order to obtain a judicial nomination. Political influence would be minimized and the independence of the judiciary insured because judges would no longer have to run in partisan elections with the support of the party as is now required. The election system is criticized because a majority of the voters do not know the candidates in a judicial election; judicial campaigns usually attract little attention, and the general public has no criteria for determining which candidate will make a good judge.

Defenders of the election system argue that judges make law and that the public must have a voice in the lawmaking process

Defenders of the election system generally begin with an impassioned plea for democracy. They argue that judges make law and that the public must have a voice in the lawmaking process. It is generally contended that members of racial and ethnic minority groups have a better opportunity to become judges through the local political processes than through a merit selection process. Furthermore, it is argued that politics are not removed from the selection process. Gubernatorial and bar association politics are merely substituted for local politics and the general public is left out of the system.

Illinois system

Supreme court, appellate court and circuit court (trial) judges are elected in Illinois by a partisan system. Candidates are placed on the ballot through a partisan primary or by petition and generally run with party identification and party support. Once elected, judges are prohibited from engaging in political activities, and they seek reelection through a nonpartisan retention ballot. To remain in office, a judge must receive an affirmative vote from 60 per cent of the voters. Only two judges have been voted out of office since the retention system was established in 1964. Supreme and appellate judges serve 10-year terms, and circuit judges serve six-year terms.

All associate circuit judges, approximately 40 per cent of the judges in Illinois, are appointed. They serve four-year terms. The associate circuit judges are selected by secret ballot cast by the elected circuit judges. All associate circuit judges are attorneys and perform virtually the same duties as a circuit judge, but in most counties associate circuit judges are generally assigned to the more routine cases such as minor criminal matters, family law, probate and juvenile court cases.

The history of how Illinois developed its current system of judicial selection points out the political consideration underlying the issue. Prior to 1964, when the judicial amendments to the Illinois Constitution went into effect, Illinois had a totally disorganized court system. There was no centralized court administrative office and there were courts with overlapping jurisdiction in counties and towns. In the early 1950's the Illinois Bar Association and Chicago Bar Association, with the support of several civic organizations, began a

campaign for court reform. This reform had the dual goals of establishing a unified court system and enacting a merit selection plan. Generally, this plan had the support of Gov. William G. Stratton and the Republicans in the legislature but was opposed by the Democrats, particularly those Democrats from Chicago. In 1957, a compromise was reached in the legislature which passed a proposal for a constitutional amendment for a unified court system but included no changes in the system of electing judges. This proposed amendment was defeated by a slim margin in the statewide vote.

Two reforms

Undaunted, the proponents for court reform almost immediately began another campaign for a constitutional amendment, but the Chicago Democrats continued to resist changes in the patisan election system for judges. The need for a reorganization of the court system was of such importance that the legislature again reached a compromise similar to the one reached in 1957. A constitutional amendment was proposed which created the court system now used in Illinois. In 1962, the voters ratified this amendment which went into effect in 1964. Although the judges were still elected, there were two significant changes. First, judges no longer had to be reelected in a partisan election campaign since the amendments provided for the nonpartisan retention ballot. This change along with the prohibition that judges could not actively participate in political activities tended to make the judiciary less dependent on partisan politics. Second, the appointment system for associate circuit judges was created.

The issue of merit selection surfaced again during the Constitutional Convention of 1969. It was vigorously debated in committee and on the floor, and the convention deadlocked over the issue. Finally, the convention reached a compromise which placed the issue before the general public on the ballot as a special question. In addition to voting on the entire constitution, voters had the option of selecting either Proposition 2A (election of judges) or 2B (appointment). The campaign over the options was vigorous. Mayor Richard J. Daley and the Cook County regular Democrats actively supported 2A. Chicago newspapers, bar associations and civic groups generally favored 2B. In the final tally, 2A won with the approval of 50.2 per cent of the vote. Those favoring 2B cast 43 per cent of the vote and 6.8 per cent of the ballots showed no preference. Ironically, 2B carried Cook County with 50.1 per cent of the vote. Voters in the collar counties of DuPage, Kane and McHenry and the university counties of DeKalb and McLean (Bloomington) also favored merit selection.

Proposition 2A did make one significant change in the election process:

Both the Netsch/Wolf and the McCourt proposals require that appellate and supreme court judges be nominated by a judicial commission and appointed by the governor

judicial candidates are no longer nominated in party convention. The party primary is the principal vehicle through which judges are nominated for the general election, and the Constitution also provides for being placed on the ballot by petition. These changes had the effect of weakening the role of political party leaders in the elections. Current Supreme Court Justices James Dooley and William Clark defeated candidates backed by the Cook County Regular Democratic Organization in the 1976 judicial primary, and they won in the general election.

Legislative proposals

The debate lingers on. There are six proposals now pending in the General Assembly to modify the partisan election system. Most of these proposals would lead to a constitutional amendment and a referendum by the general public. Five of these bills propose a merit selection plan with a judicial nominating commission. One proposal would require nonpartisan election. Four of the five merit selection plans are very similar, and therefore only two of the proposals will be analyzed. In the Senate, Sen. Dawn Clark Netsch (D., Chicago) is the principal sponsor of Senate Joint Resolution/Constitutional Amendment 37 (SJR/CA 37) which is virtually identical to House Joint Resolution/Constitutional Amendment 1 (HJR/CA 1) sponsored by Rep. Jacob Wolf (R., Chicago). The other merit selection proposal which significantly differs from the Netsch/Wolf proposal is HJR/CA 35 sponsored by Rep. James McCourt (R., Evanston), and it has the support of the Illinois State Bar Association. Both the Netsch/Wolf and the McCourt proposals require that appellate and supreme court judges be nominated by a judicial commission and appointed by the governor.

On the circuit court level the Netsch/Wolf plan would allow any county by referendum of its voters to adopt merit selection for its associate and circuit court judges. The McCourt proposal would mandate merit selection in the Cook County Circuit Court and would allow other counties to adopt merit selection. Both proposals are constitutional amendments which require a statewide referendum.

The proposals vary in the makeup of the nominating commission and the role which the governor plays. The Netsch/Wolf plan would authorize an 11-member commission for judicial circuits other than Cook County. A slightly larger commission would be used in Cook County. The commission in each circuit would consist of six nonlawyers and five lawyers. The nonlawyer members would be appointed by the governor with the advice and consent of the Senate, and no more than three of the nonlawyers could be members of the same political party. The lawyer members would be elected by the lawyers who practice and reside in the circuit. The governor would appoint one of the nonlawyers chairman, who could vote only in case of a tie. The nominating commission would review applicants for a vacancy and nominate three persons.

The governor would choose one of these three candidates to serve as judge for a six-year term. At the end of the term, the judge would be on the ballot in a retention election.

The McCourt Plan for judicial circuits has a much more complicated method for selecting commission members. The role of the governor is reduced, the roles of the bar association and the local political parties are increased and the judiciary is also represented on the nomination committee. Specifically, the nominating commission would consist of five nonlawyers, six lawyers and a judge. The judge would chair the committee and could vote only in the case of a tie.

Two of the five nonlawyers would be selected by the governor from different political parties. Each chairman of the two political parties would select one nonlawyer member. The fifth nonlawyer would be chosen by lot from a list prepared by the president of the local bar association, and the list would include one candidate from each of the major political parties in the circuit. Selecting the six lawyer members is even more complicated. One lawyer would be selected by the Democratic organization chairman and one by the Republican organization chairman of each county. The four remaining lawyers would be selected by the governor from a list of lawyers elected by the lawyers in the district. The governor would have one free choice from the list, but the remaining choices would be restricted to the lawyer who received the highest number of votes and who is of a different political party than the lawyer last appointed. The judge member of the commission would be elected by the judges in the district.

The nominating commission would review all candidates for a judicial vacancy and submit three names to the governor. One name would be chosen by lot, but the governor could accept or veto this candidate. If the governor vetoes the candidate, another candidate from the list would be selected by lot and would become the judge. Judges selected under this provision would not face a retention election until the expiration of their full term. The McCourt plan requires that the nominating commission review each candidate for retention and indicate whether the judge continues to be qualified. If the finding of the committee is negative, it would appear on the retention ballot.

Proponents of the McCourt plan argue that the complicated method for selecting the nominating commission is necessary to ensure that conflicting interests are represented. By using random selection and limiting the governor's discretion in selecting commission members, they contend that local interests are protected. Critics counter that the plan would deny the general public any voice in the process and would give too much power to local political parties and local bar associations. The McCourt proposal is clearly not a nonpartisan plan, but it does attempt to balance the various partisan and professional interests.

The remaining proposal in the legislature, House Bill 2267, sponsored by Rep. Woods Bowman (D., Chicago) would change the election method from a partisan to a nonpartisan system. This change could be implemented by legislative action without the need for a constitutional amendment. Candidates for judge would run in a nonpartisan primary; no party designation would be allowed. Candidates would become eligible for the primary by filing petitions with the signatures of 500 qualified electors. The candidates who receive the two highest number of votes would run in the general election without party label. Proponents claim that this plan would reduce the political parties' control over the primary and would lead to a more independent judiciary, but critics of Bowman's proposal contend that parties would still become involved behind the scenes. Furthermore, party labels, for better or for worse, are one of the few indicators the public may have of the judicial philosophy of a candidate.

All of the proposals pending in the legislature are now on the Interim Study Calendar in their respective houses of the General Assembly. The Illinois Bar Association has endorsed the McCourt plan. A citizens committee, the Committee on Courts and Justice, has endorsed the Netsch/Wolf proposal and is preparing a campaign to actively work for its adoption. If either proposal passes in the General Assembly, voters of Illinois may be given their fourth opportunity in 20 years to vote on judicial reform.

The voters will hear claims that one system or another leads to a better judiciary and minimizes political interference. In analyzing these claims, it must be kept in mind that law cannot be separated from politics. The issue is not eliminating politics from the selection process, but determining the proper amount of political control and from what source. In analyzing merit selection plans the membership of the nominating commission becomes crucial. The commission not only evaluates the technical qualifications of judges, but has a significant role in determining the future philosophic and political viewpoint of the judiciary. The public must be certain that this commission adequately represents the views of the general public.□

EDITORS' NOTE: None of the proposals discussed in this 1977 article passed the General Assembly. The debate on merit selection continues with bills and resolutions being introduced in every legislative session. To date, the method of selecting judges in Illinois has not changed.

Reprinted from *Illinois Issues*, June 1979

By PAUL LERMACK

Illinois judges: Too much retention and too little selection

Illinois retention-election system was designed to protect judges from political reprisals. And it does. But, without a mechanism for assessing candidates before they enter the judicial system, there is no guarantee that the judges initially elected are qualified. And under retention, an incumbent judge is almost unbeatable

UNTIL 1962, the Illinois system for choosing judges was a purely political affair. Until that time, most state judges were simply chosen in partisan elections, and success usually had more to do with party backing and effective campaigning than with a candidate's capacities and background in the law. That method was clearly fraught with problems, and in 1962 a new judicial article to the state Constitution was adopted. It included a retention-election system for choosing judges in an effort to make the judicial system less political. But after 16 years of experience with this new method, it is clear that this reform has not improved the quality of the bench and that further changes are in order.

The need to separate judicial from political matters was compelling, especially in the case of circuit judges. Unlike their appellate colleagues, trial judges sit alone, and are individually responsible to see that justice is done in their courtrooms. Since circuit courts are unspecialized, their judges must be prepared to deal with a wide variety of cases. Complex questions of tax and corporate law as well as ordinary criminal, liability and divorce cases must routinely be decided in these courtrooms. Since few decisions are appealed, justice ultimately rests on the integrity and knowledge of the trial judges, who should be free of partisan concerns in their administration of the law.

Political pressures

Introducing political pressures into the judiciary process was clearly detrimental to the legal system. Judges, after all, are not typical public servants because they should not be expected to make all of their decisions conform to the will of the people. A judge's values and judicial philosophy could be legitimate campaign issues, of course, and it was legitimate to speak of electing a

liberal or a conservative judge. But a judge's decision in any particular case should be based on the law alone, rather than on concerns about reelection. In addition to being instruments of the law, judges are symbols of it, and are, indeed, often the only contact many citizens have with it. Since the law is supposed to be impartial, judges must appear impartial, unaffected by ties of friendship or partisanship, and since the law is supposed to be just, judges should appear learned, wise and temperate. "In the long run," wrote former U.S. Supreme Court Justice Benjamin Cardozo, "there is no guarantee of justice except the personality of the judge."

But few trial judges lived up to this high image. Dissatisfaction with existing judges and hopes of creating better selection procedures were important motives behind the organization of the American Bar Association in 1878. And as recently as 1971, investigative reporter Leonard Downie, who spent two years observing criminal courts, wrote, "there are many judges in many places who depart from the ideal in ways ranging from laughable impropriety to ruthless arrogance."

In Illinois, judgeships were traditionally poor careers. Until recently, salaries were low by professional standards and job security was minimal because terms of office were short. Too often, urban political machines used judgeships as dumping grounds for their less able retainers. Some of these machine judges knew little law. Others treated their jobs as retirement sinecures, holding court for only a few hours each day and creating wearying delays in litigation. Still others made crassly political decisions, contributing to the common image of corruption in local government. In 1962, the Institute of Public Affairs of the University of Illinois said that "the partisan method of electing judges has not worked in major Illinois cities. In some cases, it has brought the courts into disrepute."

Those few well-qualified lawyers dedicated enough to seek judicial careers in such circumstances found that the frequent reelection campaigns were expensive. Often, they were forced to seek machine patronage. Moreover, they found that their opponents often used unpopular or controversial decisions as campaign issues, thereby imposing political pressures on the judicial process. In fear of losing their jobs, even the most idealistic judges were forced to make their decisions conform to the popular will, instead of exercising that independence of judgment which the law requires.

Retention's insulation

The retention-election system, adopted in Illinois by constitutional amendment in 1962, was designed to make judges more independent of machines and the public by exempting them from partisan reelection requirements. Terms of office for circuit judges were lengthened to six years, making campaigns less frequent, and theoretically reducing the dependence of judges on political parties for campaign expenses. Instead of running against an opponent, a judge is permitted to run on his record. The voters are simply asked, on a separate ballot, whether a judge should continue to serve. If a majority (raised in 1970 to the present requirement of a 60 percent plurality) of those voting answer "yes," the sitting judge is retained for another six-year term. Since there is no opponent to focus public attention on those few decisions of a sitting judge which are unpopular or controversial, the voters are expected to base their decision on the judge's total record, and on whether it demonstrates a pattern of independence and fineness of judgment. Thus, retention elections are designed to insulate judges from hasty and ill-considered reprisals.

The reform has succeeded, but much too well. Judges have become so insulated that it is almost impossible to remove any of them, even the most incompetent. In 16 years to date, only six sitting judges have been turned out of office. Of 524 judges running for retention, in other words, 518, or 99 percent, have been retained. Many of these had been found unqualified by bar associations, or were opposed by other officeholders or newspaper editorials. For example, the Illinois State Bar Association, which rates downstate judges, recommended against the retention of 10 in 1972. But all were retained. Between 1970 and 1978, the State Bar Association recommended against retaining 33 judges. Thirty-one of these 33 were retained.

In 1974, David Lefkovits, a 21-year veteran of the Circuit Court for Cook County, became the first Illinois judge to lose a retention election. Lefkovits, then 74, was one of eight judges labelled "clearly unqualified" by the *Chicago Tribune* and opposed by the Chicago Bar Association. Although the seven others were retained, the *Tribune* expressed optimism that the voters were finally learning how to use the new form of ballot, and predicted that they would remove bad judges more readily in the future.

But this has not happened. In 1976, only one judge was removed. Joseph A. Power, chief judge of the Circuit Court for Cook County and a close friend of Mayor Richard J. Daley, had been accused of political favoritism during the special grand jury investigation of the 1969 police raid on the Chicago Black Panthers headquarters during which two persons were killed. He had also been defeated in a recent election bid for the Democratic nomination for a vacant seat on the Supreme Court. The *Tribune*, now much more pessimistic, noted that three other Chicago judges

Judges have become so insulated that it is almost impossible to remove any of them

Judges denied retention

Here is a list of all Illinois judges denied retention by the voters since the first retention election in 1964:

Year	Judge	Circuit
1974	David Lefkovits	Cook County
1976	Joseph A. Power	Cook County
1978	John S. Boyle	Cook County
1978	William Ginos	4th
1978	Charles W. Iben	10th
1978	Albert Pucci	10th

To date, no appellate judges have been denied retention.

Of the states now using retention elections, Illinois is the only one which does not have selection boards

had been retained despite a "consensus of informed opinion against them" and editorialized that Power was defeated only because his political bias had become unmistakably visible. Since no partisan opponents exist in retention elections to publicize the records of the incumbents, the *Tribune* concluded that there is no way for the voters to rationally assess them: the voters will tend to retain any sitting judge unless political notoriety makes his bad record inescapable. In this "parody of normal elections," as the *Tribune* described it, a judge who is incompetent but quiet is unbeatable.

Boyle's defeat

The defeat in 1978 of John S. Boyle, Power's successor, tends to corroborate this view. Boyle was politically notorious. The Chicago Council of Lawyers, which recommended against his retention, accused him of using the chief judge's assignment power to place politically sensitive cases in the hands of judges who were responsive to the influence of the Cook County democratic machine.

But while these cases seemed to mark extremes in which clear abuses of power had awakened a normally apathetic electorate to "recall" the perpetrators, the defeat in 1978 of two 10th Circuit judges is less easy to explain. Although each had provoked opposition, neither was as controversial or political a figure as Boyle or Power. Albert Pucci of rural Putnam County was 68 years old and had been ill. And Charles W. Iben of Peoria was accused of "arrogance" and lack of judicial temperament.

The case against Iben was given focus by the Peoria *Journal Star*, which published four editorials on the subject. These editorials provoked comment, exchanges of letters and the interest of other mass media. Iben was accused of insensitivity, of inattention on the bench, of holding sloppily informal court sessions, of holding negotiating sessions with attorneys in his chambers out of hearing of the litigants in the case (a possible violation of judicial ethics), and of keeping short hours.

The *Journal Star* acted as an old-fashioned crusading newspaper. But it was not wholly disinterested. Iben had the reputation of being a liberal judge and of setting low bail amounts in criminal cases. In this, his values were somewhat out of line with the relatively conservative circuit in which he worked, and with the *Journal Star* itself. The newspaper opposed him out of philosophic conviction. In a sense, by publicizing the worst aspects of Iben's record, it performed the function usually performed in elections by the opponent.

Without this focusing of opinion by the media, it is doubtful that any sitting judge can be defeated. Bar associations try to draw public attention to poor judges by making public recommendations on retention. But their influence is limited. Of 16 downstate judges opposed by the Illinois State Bar Association in 1978, for example, 14 were retained. One of them, Charles M. Wilson of rural Toulon, best summarized the influence of the organized bar: "The laymen don't care what the lawyers think."

One suggestion for improving the performance of the retention-election system is to encourage other public officials to publicize judicial incompetence. Sheriffs, public defenders and especially state's attorneys are ideally located to compare judges and to recognize poor performance. Moreover, since they regularly work with judges, they are likely to judge performance on the basis of the total record and not by a single controversial incident. But public officials are reluctant to speak out against bad judges, in part because legal ethics forbid speaking derisively about a sitting judge, and in part because state's attorneys fear reprisals from judges who are retained over their opposition. Perhaps most important, when such opposition occurs, the public seems to perceive it as "political" and to discount it. For example, McLean County State's Atty. Ronald Dozier actively opposed the retention of 11th Circuit Judge Keith Campbell in 1978, accusing him of "irrational and bizarre behavior" on the bench. But Campbell was retained.

Other states have had similar experiences. For example, in 1972 the Chicago-based American Judicature Society, which favors the retention-election system, surveyed the 11 states then using it and found that only four judges had been defeated that year. The society commented that retention elections do not "assure life tenure," but acknowledged that the present system makes it difficult to unseat incumbent judges, regardless of the inadequacies in their performances.

The purpose of the retention-election system is, of course, to protect judges from capricious and arbitrary attacks based on political grounds. The irony is, however, that this insulation from politics has apparently not improved the quality of the bench, if recent elections are indicative. Of the judges retained in 1978, for example, Sam Harrod III of the 11th Circuit had been disciplined by the Courts Commission for arrogant conduct on the bench (although the punishment was later set aside by the Illinois Supreme Court on a technicality). Also suggestive is the fact that 12 of the 23 judges retained in the Chicago area in the last election had been found unqualified by the Chicago Council of Lawyers. The Judicial Inquiry Board, created by the 1970 Constitution to deal with complaints against sitting judges, has heard charges ranging from fixing traffic tickets to collusion with organized crime.

When a circuit or appellate judge is defeated, a temporary replacement is appointed by the Illinois Supreme Court. At the next general election, a permanent replacement is elected on a partisan ballot — that is, on the basis of party support or public appeal, rather than legal credentials. The retention system, which makes it difficult to remove a sitting judge, has not been coupled with some mechanism for assessing the qualifications of candidates before they are chosen. In partisan elections, there is no way for candidates to demonstrate anything resembling judicial temperament; since merit does not descend on new judges like Elijah's

mantle, it would seem necessary to make sure candidates are properly qualified before they become judges.

One way to do this would be to have the qualifications of candidates scrutinized by judicial selection boards. These nominating commissions would be composed partly of lawyers, partly of judges or retired judges, and partly of laymen. The governor would appoint new judges, but he could appoint only persons recommended by a selection board. Judicial nominating boards are presently used in 22 states, and the American Judicature Society, which recommends this "merit system" (or "Misouri plan" since that state was the first to adopt it) contends that it improves the quality of judges. Critics argue that the merit system undesirably strengthens the organized bar associations (who choose some of the board members in most states) and ignores the wishes of the public.

Constitutional change

An article to create selection commissions and to choose judges by gubernatorial appointment was included in the draft of the Illinois Constitution of 1970. But the system was bitterly opposed by Democratic delegates loyal to the Cook County machine, which felt that the existing elective system was a valuable source of patronage for the organization. The machine politicians were strong enough to have the merit system section removed from the Constitution and submitted to the voters as a separate question. Although the voters accepted the main body of the Constitution, they rejected the merit system for choosing judges.

But various good-government groups have continued to press for selection boards, and the nonpartisan Committee on Courts and Justice has announced that it will try to persuade the General Assembly to create such a system in 1979. The committee's chances for success may be improved by the recent political reverses which the Cook County Democratic machine has suffered. Indeed, in 1976 and 1978 reform Democrats succeeded in defeating machine candidates for the Democratic nominations for vacant judgeships. The defeat of Power in his bid for the Supreme Court was one such case.

Other possible reforms include the adoption of nonpartisan elections (now in use in 16 states), or the adoption of unrestricted gubernatorial appointment (used in the federal system and nine states). Where nonpartisan elections are used, judges run for reelection against opponents, but the candidates are not identified by party labels. The system is supposed to minimize the influence of the parties, while retaining the voice of the public. But political scientists find that nonpartisan elections are prey to the same problems which plague the discredited partisan elections which Illinois now uses. Unrestricted gubernatorial appointment is said to produce increased attention to judicial qualifications: since the governor must run for reelection on his record, he will try to recruit judges to whom he can point with pride. But critics argue that such a system strengthens the political power and patronage resources of governors, and correspondingly weakens legislatures and local governments.

The adoption of the merit system is both the most likely reform and the one that would cause the least disruption in the present procedure. Of the states now using retention elections, Illinois is the only one which does not have selection boards. Since experience shows that it requires heroic political efforts to remove a judge once he is seated and can run for retention, the creation of a better method of recruiting qualified candidates seems clearly necessary. □

Paul Lermack is associate professor of political science at Bradley University, Peoria.

WHO VOTES?
WHO WINS?

ILLINOIS ELECTIONS
(2nd edition)

The most complete examination of state electoral issues in print is now available. This expanded edition contains ten articles from the first edition and twenty new articles. Five of these are published for the first time. The remainder appeared in *Illinois Issues* or the publications of the Institute of Government and Public Affairs at the University of Illinois. Samuel K. Gove, director of the Institute, has written a new preface for the collection.

The collection is divided into six parts:

I. Voting Patterns in Illinois
II. Voting Patterns in Chicago
III. Reapportionment and Legislative Elections
IV. The Decline of Party
V. Presidential Nomination Politics in Illinois
VI. The Consolidation of Elections

A total of 15 authors contributed to the collection:
Barbara Leavitt Brown, Peter W. Colby, Paul T. David, David H. Everson, Paul M. Green, John S. Jackson III, Walter Karnig, Robert Mackay, Ronald D. Michaelson, James D. Nowlan, Joan A. Parker, James Przybylski, Luis M. Salces, Oliver Walter, Charles N. Wheeler III.

Standard bookstore discounts are available with orders of 15 or more. **Price: $8.95.** 117 pp. Send orders to *Illinois Issues* (for address, see box on inside front cover).

Reprinted from *Illinois Issues*, January 1982

Illinois trial judges: pragmatic fact finders

By STEPHEN DANIELS, REBECCA WILKIN and JAMES BOWERS

Although Illinois trial judges handle over three million cases a year, involving tens of millions of dollars, the public's general perception of them is based largely on fragmentary information and splashy accounts of sensational trials. The following article, based on an extensive survey of state trial judges conducted by Sangamon State University's Center for Legal Studies, presents a clear picture of these judges, their backgrounds, their work and the way they see themselves

JUDICIAL REFORM has been a perennial issue in Illinois and elsewhere for a century. Without it, many good government groups and professional organizations might well disappear for lack of a sufficient evil with which to do battle. There has been considerable and often heated debate over the problems of the courts and their proper function or role in U.S. society.

Most reform efforts have been aimed at the foundation of the judicial system — its trial courts and trial judges. Yet it is ironic that with all of the talk and effort about reform, we still know surprisingly little about trial courts and judges in Illinois and what exactly is "out there," especially beyond Cook County. As court researcher John Paul Ryan and his collaborators put it, our views of the lowest parts of the system ". . . are a curious mixture of fictions and half-truths." We either think that judges are too political and corrupt or we fall under the spell of what the late Judge Jerome Frank characterized over 30 years ago as the "cult of the robe" — that judges are or should be ". . . oracles of an impersonal higher law. . . ." Our intention is to make a modest, tentative contribution to overcoming the lack of knowledge and understanding of Illinois trial courts and judges. We can offer nothing earth-shaking or scandalous, and we propose no reforms. Rather, we want to replace some myth, some of the "fictions and half-truths," with a bit of reality.

Many of our impressions of the lowest courts are formed either by reports from critics and insiders, or by titillating glimpses behind the judicial bench in sensational coverage of "big trials." Scholars have focused primarily on the upper courts over the years, and our awareness of the lower levels has been limited. The fictions and half-truths and gaps in our knowledge of these lower courts are unfortunate because the Illinois trial courts represent an enormous investment by the state in the ordering of private, civil matters and in the enforcement of state policies. In the words of one trial judge: "The trial judge functions at the level of the legal system which is closest to . . . real life situations."

At the time of the survey, according to lists provided by the Illinois Court Administrator's Office, there were 654 sitting trial judges in Illinois, 371 circuit judges and 283 associate judges. They handle over three million cases a year, involving tens of millions of dollars and perhaps hundreds of thousands of people. Yet we know almost nothing about them. What are their backgrounds and what did they bring with them to the bench? What do they do? On what do they spend their time? And how do they perceive their roles or functions as trial judges? This last item is particularly important, for students of human behavior have found that in many situations the way in which people perceive their role can have a major effect on how they play that role.

To address the questions we have just posed, in 1980 we conducted a mail survey of a sample of Illinois trial judges. Surveys were sent to about half of the circuit and half of the associate judges across the state. Overall, our response was 51 percent, or 159 out of a sample of 312. Of the 177 circuit judges, 55 percent responded, and of 155 associates 45 percent responded.

The judges

We began with the judges themselves and the backgrounds and experiences they bring to the bench. Our interest was in what the recruitment process has given the state, and eventually in what effect this has on the judiciary. Recruitment refers to the process by which judges reach the bench — their family background, their political experience, etc. It includes the selection process, but this is only the end of the process. In short, asking about recruitment means asking what kind of person becomes a judge and what difference, if any, it makes.

By looking at the averages and percentages in the responses to our survey, we can construct a portrait of the "average" trial judge in Illinois. This portrait combines the responses from both the circuit and associate judges (see table 1). The average judge in Illinois is a white male, 52 years of age. He was born in Illinois and has lived most of his life in the circuit which he serves. He came to the bench when he was in his middle-forties, and has served on the bench for a little over eight years. Politically, he is only a bit more likely to be a Republican than

The average judge in Illinois is a white male, 52 years of age. He was born in Illinois and has lived most of his life in the circuit which he serves . . .

Democrat, and he is moderate to strong in the strength of his party preference. He is likely to be middle-of-the-road to conservative in his stand on political issues. In terms of religion, he is almost as likely to be Catholic as Protestant, and if Protestant he is more likely to be either Methodist or Presbyterian. He is very unlikely to be Jewish.

The survey also attempted to examine the judicial recruitment and selection process in the broadest sense, to determine what kinds of people become judges and what differences, if any, their backgrounds make. Background information on a father's occupation can be seen as at least a rough indication of social status. The fathers of the average judges could have been almost anything, though they are somewhat more likely to have worked in professional/managerial occupations. About one-third fell into this area, which includes the legal profession. Only a bit over 10 percent of the paternal occupations were in law, and only one was a judge. Other occupations ranged from coal miner to physician, from factory worker to minister. The average judge is, of course, college-educated, and he most likely took his undergraduate degree (68 percent) as well as his law degree (75 percent) in Illinois. His undergraduate major is most likely to be in political science or one of the other social sciences, in economics or in a business-related area.

Judges do not consider it their task to 'remake' the law. Rather, they see their function as a limited and pragmatic one

Three important things emerge from this part of our portrait of the average trial judge in Illinois. First, the present *recruitment* process (not only in Illinois but elsewhere) produces a trial judiciary almost exclusively white and male. Almost 98 percent of the judges responding to our survey were male, and 92 percent were white, and all female judges responding to the survey were associate judges. Second, Illinois trial judges seem to be a relatively conservative lot. Third, as studies in other states found, there is a very strong element of localism in the judges' backgrounds. Most judges are Illinois-born and educated, and have lived their lives in their circuits. We could presume, as a result, that they reflect with fidelity the values and norms of their respective communities. The survey suggests that the judges' conservatism and their identification with community values gives them a limited rather than an expansive view of what their role is on the trial bench.

The average judge came to the bench directly from private practice (67 percent of all judges). A little over 10 percent came directly from an elected public office, and a little better than half of these elected officials were state's attorneys. Approximately 8 percent were assistant state's attorneys and another 6 percent were employed in some other government position. Also, about 30 percent of the judges said that they had been political officeholders at least once in their careers before coming to the bench.

Because the trial judge may hear cases in many areas of law, it is worthwhile to know if they bring any particular substantive expertise to the bench, especially since fewer than half report having had any special training after reaching the bench. The average judge considered himself especially competent in at least one area (87 percent), and possibly in two areas (68 percent). The areas of special competence are most likely to be criminal, trial litigation or probate. By far, criminal is the most often listed — 28 percent listed it as their first specialty, 11 percent as their second and 4 percent as either third or fourth. Only 25 percent reported an expertise in four areas. Overall, the areas of expertise are scattered across the legal spectrum from appeals to zoning, suggesting that many judges had a relatively general practice.

The methods of selecting judges have caused continuing debates about relative virtues of elections (either partisan or nonpartisan) or appointments of judges. Many states use a combination of both systems. In Illinois, circuit judges are *elected* on a partisan ballot, associate judges are *appointed* by the circuit judges of their respective circuits. The survey revealed few major differences when comparing the average circuit judge to the averages for his associate counterpart. Both are white and male. Both are likely to be conservative in their stances on issues. Politically, the circuit judge is more likely to be a Democrat, and he is also a little stronger in his party preference (perhaps reflecting the partisan nature of his selection process). Both are likely (65 percent and 71 percent, respectively) to have come from private practice. With minor differences, both come from similar social, economic and educational backgrounds.

Both circuit and associate judges have lived in their respective circuits most of their lives, although a circuit judge is likely to have spent a greater proportion of his life in his circuit. Still, localism is strong when we consider that both are likely to have been born and educated in Illinois.

In general, the method of selecting a judge in Illinois (appointed associate versus elected circuit) and the entire recruitment process has produced judges who are, on the average, more similar than dissimilar. The circuit and associate judges differ the most in areas of party preference, ideology, and perhaps localism.

Docket

One method of exploring what a trial judge does is to examine how the judges characterize their dockets — as either confined to one legal area, or including a variety of cases. About 55 percent of all judges are assigned to a particular area with the remainder having a general docket. Circuit and associate judges are about equally as likely to be assigned, and if so the most likely assignment is criminal cases (14 percent of all judges were assigned to criminal at the time of the survey). The rest of the assignments are in widely scattered areas.

We asked those judges not assigned to break down their dockets in terms of percentage of caseload in various areas. As might be expected, the nonassigned judge — both circuit and associate — handles a wide range of cases. Again, there are some small, but noticeable differences between the nonassigned circuit and associate judges (see table 2). The associate

Table 1. **Profile of Illinois trial judges**

	Combined circuit and associate judges (N = 159)	Circuit judges (N = 98)	Associate judges (N = 61)
SEX:			
Male	98.1% (156)	100% (98)	95.1% (58)
Female	1.9% (3)	0	4.9% (3)
RACE:			
Black	4.4% (7)	6.1% (6)	1.6% (1)
Caucasian	95.0% (151)	93.8% (92)	95.8% (59)
Hispanic	0.6% (1)	0	1.6% (1)
BORN IN ILLINOIS:			
Yes	81.7% (130)	82.7% (81)	79.5% (49)
No	18.2% (29)	17.3% (17)	19.7% (12)
LIVED IN CIRCUIT:			
Average in years	39	44	32
Minimum in years	4	8	4
Maximum in years	73	73	68
AGE:			
Average in years	52	54	49
Minimum in years	31	31	31
Maximum in years	73	73	68
SERVED ON BENCH:			
Average in years	8	10	6
Minimum in years	1	1	1
Maximum in years	33	33	15
PARTY PREFERENCE:			
Democrat	45.9% (73)	51.0% (50)	37.7% (23)
Republican	47.8% (76)	44.9% (44)	52.5% (32)
Independent	2.5% (4)	1.0% (1)	4.9% (3)
No response	3.8% (6)	3.1% (3)	4.9% (3)
STRENGTH OF PARTY PREFERENCE:			
Weak	10.1% (16)	10.2% (10)	9.8% (6)
Moderate	49.7% (79)	46.9% (46)	54.1% (33)
Strong	35.8% (57)	38.8% (38)	31.1% (19)
No response	4.4% (7)	4.1% (4)	4.9% (3)
STAND ON POLITICAL ISSUES:			
Strong conservative	5.0% (8)	4.1% (4)	6.6% (4)
Moderate conservative	40.3% (64)	39.8% (39)	41.0% (25)
Middle-of-the-road	26.4% (42)	21.4% (21)	34.4% (21)
Moderate liberal	21.4% (34)	25.5% (25)	14.8% (9)
Strong liberal	2.5% (4)	3.1% (3)	1.6% (1)
No response	3.8% (6)	6.1% (6)	1.6% (1)
RELIGION			
Catholic	42.8% (68)	44.9% (44)	39.3% (24)
Protestant	44.1% (70)	43.9% (43)	44.1% (27)
Jewish	4.4% (7)	3.1% (3)	6.6% (4)
Other	0.6% (1)	0	1.6% (1)
None	1.9% (3)	1.0% (1)	3.2% (2)
No response	6.3% (10)	7.2% (7)	4.9% (3)

judge's docket includes a higher percentage of small claims and slightly larger percentages of family and juvenile cases. The circuit judge's docket has a larger percentage of common law cases and a larger percentage of divorce cases. His docket also has slightly higher percentages of probate and chancery. The circuit judge, whether assigned or not, also reports spending a little more of his time on purely administrative matters.

Two things emerge from this brief overview of how the judges describe their dockets. First, associate judges, who are a bit more likely to hear family and juvenile matters, are also a bit more likely to bring to the bench an expertise in these areas. It is also interesting that even though divorce accounts for the third largest percentage of the average circuit docket (non-assigned), it is not likely that divorce will be an area of expertise brought to the bench by a circuit judge. Second, and perhaps contrary to common assumption, judges as a whole do not spend most of their time on criminal matters. This is particularly interesting since most circuit and associate judges who bring an expertise to the bench are likely to have that expertise in criminal law.

Perhaps the most interesting results of our survey came from the judges' own perceptions of their roles as trial judges. They do not simply apply the law to the facts of the situation and thereby resolve disputes, yet, neither do they see themselves as being activist and interventionist, as being involved in the "remaking" of law. Reflecting their generally moderate to conservative ideological stance, the judges see their function as a limited and pragmatic one.

This pragmatic approach is seen in the average judge's idea of the differences between the trial and appellate functions and his view of the personal qualities most important to his work. The trial judge, on the one hand, is a fact finder; he is people-oriented; and he has to be spontaneous. By contrast, appellate judges are seen as having more time to decide cases and as being more law or procedure oriented. According to one judge: "The trial judge . . . shoots from the hip. . . ." Another judge made essentially the same analogy: "The chief difference . . . deals with urgency [and] immediacy — shooting from the hip, if you please." Still others characterized the difference through a battlefield analogy: "The trial judge is in the battlefield while the appellate judge is in the war station receiving the reports . . . concerning what took place in the field." Another judge put it this way: "The appellate judge is removed from the scene of battle . . . the trial judge is a part of the courtroom battle."

The judges' pragmatic and limited view of their role is also seen in their rankings of personal qualities felt to be most important to their work. Honesty and integrity were most likely to be rated first, followed by impartiality, common sense, and then knowledge of the law. Good government associations and the general public should be pleased by the high rating for honesty and integrity. But some might question the lesser ranking for knowledge of the law at this fundamental level of the legal system. Some might also find it at least curious, if not unfortunate, that an awareness of social problems is not really considered as an especially important trait.

The judges' limited and pragmatic views were especially evident in their responses to a list of specific statements about the judicial function. Their pragmatic view is very obvious and may well be a product of the immediacy of their function in the trial

Table 2.
Judges' characterization of their dockets (nonassigned)

	Circuit Judge	Associate Judge
Criminal	12%	12%
Common law	9%	5%
Divorce	8%	4%
Probate	3%	2%
Chancery	3%	2%
Traffic	2%	11%
Small claims	2%	6%
Family	1%	3%
Juvenile	2%	3%
Other	2%	2%

court — a product of the "courtroom battle." The average judge is very administratively oriented, for example. Since justice requires promptness, he wants to clean up his docket. He does not see his function as arbitrating the fundamental divisions in society, and he is ambivalent about whether courts are an appropriate forum for the disadvantaged elements in society. In short, the average judge is not an activist, not an innovator, and certainly not a social engineer. While there may be great debate and concern in some quarters over an "imperial judiciary" usurping the powers of the other branches of government, there seems little reason for concern over Illinois trial judges in this regard.

The concern for cleaning up dockets and for promptness seems to be an overriding concern for the average judge. The problem is how to accomplish this. Even though he feels constrained by existing law and does not see himself as a lawmaker, the judge approaches the problem pragmatically and flexibly. He is not so committed to existing law that he feels it is always the best policy to mechanically apply it. He is *not* likely to agree that in most matters it is most important that the applicable rule be settled and applied; rather, the average judge seems to feel that common sense can be more important than strictly and mechanically applying the law in a case. He is quite likely to think of the law as a framework within which he operates, and that day-to-day decision-making demands that he exercises his own judgment and discretion.

The average circuit judge may be a bit less pragmatic than the associate, however, and he is not as likely to see common sense as being more important than strictly applying the appropriate rule (38 percent v. 54 percent). Additionally, the circuit judge is slightly more likely to see courts as a forum for the disadvantaged. Often, the average judge is probably acting as a pragmatic arbitrator within what he sees as a broad but well-defined legal framework. One judge summed this up nicely: "The trial judge must sometimes look beyond the letter of the law and in so doing assess the myriad of components to enable him to do justice to all parties concerned."

Overall, there appears to be little fundamental difference between judges from Downstate and those from Cook and the collar counties in terms of how they view their functions. More noticeable differences emerge when considering judges as a whole and their political party, ideology, years as a judge and age. While judges from both parties share many views and values, the average Democratic judge is much more likely to see courts as an alternative forum for the disadvantaged than his Republican brethren. Similar and somewhat greater differences exist among the average liberal, moderate and conservative judges. The liberal judge feels far less constrained by existing law, and more likely to see the courts as a forum for the disadvantaged than either the moderates or conservatives. Regardless of ideological stance, there is substantial agreement about the need for discretion, and equal agreement on the importance of common sense.

Judges who have been on the bench longer appear to have a broader view of their function. They tend to feel less constrained by the law, yet they find the use of common sense to be less appropriate. They are somewhat more likely to see their function as arbitrating society's fundamental and rival forces, and to see courts as an appropriate forum for the disadvantaged. Interestingly, they are not likely to see themselves as lawmakers, yet remain highly committed to discretion and cleaning up the docket. Younger and newer judges, in contrast, seem to bring with them a narrower, more limited view of the courts. Additionally, the type of work a judge does may affect his view of the judicial function.

Those who are not assigned to a particular legal area feel less constrained by existing law, and those assigned to criminal appear to feel the most constrained. Differences also appear in regard to whether the judges feel that courts arbitrate society's fundamental and rival forces. Nonassigned judges are less likely to think so, but there is a dramatic difference when nonassigned judges are compared to those assigned to criminal. Those assigned to juvenile cases appear the least likely to accept this view of the court as arbiter of basic social conflicts. While there is little difference on the idea of the court as a forum for the disadvantaged, the exception seems to be those assigned to juvenile. They are far more likely to see the courts as an appropriate forum for the disadvantaged. Such differences may suggest that one of the more important factors shaping a judge's view of his function will be the influence of the types of cases he hears.

Perspectives

Generally speaking, however, there is much more similarity among Illinois judges than dissimilarity, even when comparing judges selected in different ways. Diversity, aside from perhaps party preference and religion, is not a characteristic of Illinois' trial judiciary. It is characterized by a high degree of localism; a noticeable leaning toward conservatism; and, perhaps most interestingly and importantly, an unusual view of the judicial function — one limited in scope but pragmatic in practice. What differences in perspective there are concerning the judicial function may be as much the product of what specific things individual judges do as of their background, party preference or ideology. It would seem that the job may mold the judge.

We began by saying that we intended to provide no reforms, but rather to begin chipping away at the "fictions and half-truths" which seem to comprise the accepted view of trial courts and judges. We would like to conclude by raising some of the implications of our effort. First, the often emotional debate in Illinois over how judges are *selected* may, to a degree, be beside the point. The two very different ways in which circuit and

associate judges are chosen produce surprisingly similar sets of judges. As a number of scholars have argued, closer examination is required of the more general process of *recruitment*, the process which provides the "pool" of potential judges. That recruitment process has produced a judiciary almost totally white and male, and this raises serious questions of representativeness; and at least in terms of the federal courts there has been increasing concern over female and minority representation on the bench in recent years. It would seem that a similar concern is needed in Illinois.

Within the traditional model of decisionmaking, questions of representation should not be relevant. The judge is to dispose of matters by strictly applying the law to the specific facts of the parties' situation in an almost mechanical fashion. According to legal historian J. Willard Hurst, "This job was commonly thought of as the 'trial of cases,' it centered on the courtroom drama." Discretion is to be at a minimum, if it exists at all. In a sense, the "law" dictates a particular decision rather than the judge. This presumes, however, that what trial courts primarily do is resolve real, live disputes. But studies in Illinois and other states suggest that vast bulk of matters trial courts handle do not involve real, contested trials or matters whose outcome is uncertain. These studies show that the business of trial courts is (and has been) in reality quite routine and administrative. Contested trials are few (and always have been) for both civil and criminal matters. What we have discovered about how the judges view their functions is consistent with this portrait of trial court business as routine and administrative, and leads to the second of our conclusions and its implications.

Juvenile court judges are far more likely to see the courts as an appropriate forum for the disadvantaged

On the whole, Illinois trial judges are pragmatists. They do not seem to accept the traditional, mechanical model of decisionmaking, interestingly, not out of any apparent commitment to "pragmatism" as a formal theory of judging, but because the job requires it. The traditional model holds that the "law" dictates a specific decision in each kind of situation. For the judges, the "law" only demarcates the boundaries for decisions, and out of necessity these boundaries must be quite broad. Discretion and common sense, within these broad boundaries, become the hallmarks of judging. This raises again the question of representativeness. If a certain degree of discretion and common sense are the hallmarks of judging, then who the judges are and what they are makes a difference. And the lack of diversity — at least in terms of gender and race — of Illinois' trial judiciary suggests that the perspectives of certain segments of society are not represented and hence may have less influence on the way in which discretion and common sense are used and to what ends.

More generally, the view Illinois trial judges have of their function, coupled with the idea that most of what trial courts do is routine and administrative, suggests that we may need to rethink our views and expectations of trial courts and judges. Judgments — whether by professionals, good government groups, legislatures or the public — concerning both the performance of judges and the various plans to enhance the administration of justice depend upon the way in which the judicial function is perceived. Unless we are prepared to rethink our views and expectations of trial courts and judges in the context of their actual behavior, we can look forward to the question of judicial reform in Illinois remaining a perennial issue. Indeed, we may even need to reconsider some of the reforms of the past 15 to 20 years.□

Stephen Daniels is assistant professor of political science and public affairs at Sangamon State University, Springfield. Rebecca Wilkin holds an M.A. in legal studies from Sangamon State and is a research associate in SSU's Center for Legal Studies. James Bowers holds an M.A. in political studies from SSU and was a graduate assistant in SSU's Center for Legal Studies. This research was conducted under the auspices of SSU's Center for Legal Studies.

Breadbasket or Dust Bowl?

Will Illinois maintain its legacy as a land of abundance or will its land gradually decline into a desert-like wasteland? The answer must be decided now before continued erosion and conversion of this land to nonagricultural uses make the choice for us.

Illinois Issues' special publication on Illinois farmland is a collection of six articles that appeared in the magazine between September 1981 and February 1982. In this series, funded by The Joyce Foundation, author James Krohe Jr. explores the threats currently confronting the soil of Illinois and the various conservation methods that can avert a future crisis.

Breadbasket or Dust Bowl? also includes a preface by Illinois Agriculture Director Larry A. Werries, a complete listing of Illinois' Soil and Water Conservation Districts and a bibliography of soil conservation resource material.

Get involved in Illinois' efforts to save its soil. . .begin by ordering *Breadbasket or Dust Bowl?* today.

Copies of this special publication on Illinois farmland can be obtained by sending $4 plus $1.00 for postage to:
ILLINOIS ISSUES
Sangamon State University
Springfield, IL 62708
(Telephone: 217-786-6084)

Reprinted from *Illinois Issues*, March 1981

The Illinois Appellate Court

The wheels of justice grind exceeding slow

By JANEEN BURKHOLDER

It takes an average of 649 days to get a case through the First District Appellate Court, plus another 113 days between announcing the court decision and issuing orders. What is the reason for this sluggishness? The National Center for State Courts cites an increasing case load and poor organization and administration.

THE NUMBER of cases filed in the Illinois Appellate Court has almost quintupled since 1964 when 1,211 cases were filed with the new state appellate court; in 1979 an astounding 5,641 new filings were made. The problem is reaching the critical level. The appellate backlog and delay is no longer spoken of in terms of days, but rather in months and years, according to the National Center for State Courts.

The state appellate court rarely finds itself the attention of the media or law journals. Perhaps the reason is that the appellate court is usually the "middle court." The news was made by the circuit court when a case was originally decided and, if it is a controversial decision, the state Supreme Court will usually make the final ruling.

The appellate court does find itself in the middle of the court system's problem of adjudicating cases within a reasonable time period. It does have a large caseload, partly because it is the court of first review for appeals from the circuit courts, and it is sometimes the court of last resort for others, since the Supreme Court is not mandated to hear all cases.

The problem of delay in the court system is ultimately a problem of "justice." Illinois Supreme Court Justice Walter V. Schaefer has said, "It's important not only that justice be done, but that justice be seen to be done." Whether applied to trials in the circuit court or review in the appellate court, the appearance of justice being done includes the element of time.

Is justice being served well in the appellate court? With its huge backlog and endless delay, the appellate court has trouble giving the appearance of serving justice, because often for the litigants involved, justice equals speed.

At the same time, recent trends show a tendency toward encouraging litigants to appeal. The Illinois Appellate Court is now hearing cases that previously went directly to the Supreme Court as well as cases from new areas of jurisdiction on administrative actions, such as appeals from the Illinois Environmental Protection Agency. There also is a great increase in the appeals cases from the traditional areas of appellate jurisdiction.

Much of the increase in new cases filed each year may be attributed to specific substantive developments now making the judiciary more amenable to certain kinds of claims, such as civil rights. Part of the increase may also be attributed to a corresponding increase in the availability of legal services to those convicted of crimes.

There is an increasing trend toward litigation as a means of resolving disputes, and the end result has been not only an increase in the number of new cases filed, but also an increase in the complexity of those cases. The workload is understated by the mere number of cases filed.

Litigation explosion

Fourth District Appellate Judge James C. Craven has said he is not overly concerned about this "litigation explosion" because it indicates that the courts are doing their jobs well. "I think it is a compliment to the court system that now [people] think they'll get a fair shake." He called the influx of new cases "healthy" but he admitted, "the unhealthy thing is that we're getting snowed."

It is not surprising that a district the size and population of Cook County would have a poor track record; the backlog and the length of time before disposition of cases continues to increase. Compared to downstate districts, the first district is slower in disposing cases and has a higher rate of Supreme Court reversal. But while other districts are somewhat more speedy, the problems of Cook County may indicate the problems that will develop downstate.

A study begun in 1978 and released in 1980 by the National Center for State Courts examined the Illinois First District Appellate Court and 10 other states' appellate courts. Using this study, the center will offer technical assistance to states in an effort to reduce delays in state appellate courts across the nation.

The center isolated two main causes of delay: (1) The appellate courts "simply do not have the personnel or resources to keep up with increasing case volumes," and (2) the courts are "poorly organized and inadequately administered."

On the specific study of the Illinois first district in Cook County, the report stated, "The first district could not effectively meet the demands imposed, by a relatively modest case volume." The report showed that total case processing time averaged 549 days, a length greater than any of the other 10 courts examined under the center's time lapse study. Also, the number of filings per judge in the first district was lower than those of most judges in the other 10 courts studied.

It was found that the biggest delay occurs at the pre-decision stage and with transcript preparation. However, the number of cases ready to be heard exceeded the number of cases the court was able to hear. Thus there appears to be a reluctance on the part of the court to strictly enforce the time limits specified in its own rules. And if those waiting to be heard do not believe the court will meet its own schedule, the circle gets vicious. The report states, "Attorneys, court reporters, and trial court clerks might be reluctant to prepare and file promptly necessary materials due to their perception that the case would not be heard immediately." If the papers are not filed on time because of scheduling procedures, this in turn causes even more scheduling difficulties.

The study found that an average of 3.53 time extensions were requested per appeal in the first district, and that rate was substantially higher than in the 10 other states studied.

The center also found that cases

ready for oral argument are not being heard immediately, but instead are added to the backlog. To further compound the delay, the time lapse between announcing the decision of the court and issuing orders is an average of 113 days.

In addition to case scheduling and assignment problems, the center's study also cited judges' work habits as contributing to a "general climate of uncertainty concerning when cases will be taken under submission."

The Chicago Council of Lawyer's publication, *Chicago Lawyer*, reports that the first district is not well served by the system of electing judges. Several judges have served as ward and township committeemen, precinct captains, aldermen or party officials, indicating that politics has more to do with judgeships than "high quality in legal knowledge, experience, judicial temperament, political independence and character."

Judge Craven said, "The problem isn't the productivity of judges. If we assume that 500 cases are filed, you have 500 cases to decide, and you do them under this time schedule without reference to how many. If two cases are filed, you do them under the same schedule. So you do as much as there is to be done." Craven does concede, however, that judges can be criticized for their often old and sometimes slow ways.

Case scheduling, assignment problems and judges' work habits have all been cited as contributing to the delay

In an effort to reduce the time in disposition, one unfortunate response is to rely more heavily on written arguments than oral arguments. This trend is indicated by the foreshortening of time allowed to attorneys. Whereas the courts previously allowed as much as an hour to both sides for oral argument, the norm now is to allow only 45 minutes, and sometimes as little as 20 minutes.

This response is regrettable, because oral argument serves to enhance the quality of the decision, and even speeds the judges' ability to assimilate ideas. However the hearing procedure is a bottleneck, and courts often invite waiver of oral arguments when written briefs will suffice and oral argument may be redundant.

Good, bad shortcuts

Judges also may shorten the conference time to speed cases if the judges have sufficiently discussed the case during argument and substantially agree. And judges may issue "memorandum decisions" rather than write lengthy opinions if a decision does no more than affirm a sentence in a criminal case or if no new rule of law is being articulated.

While memorandum decisions have allowed more cases to be decided each year, fewer written opinions are being produced in proportion to the growing number of cases filed each year. Supreme Court Judge Robert Underwood said in 1973: "Some Appellate Court judges are not producing as many opinions as they could. It is the opinion of the Supreme Court that each judge of the Appellate Court could produce a minimum of 60 opinions per year." The average number of opinions per judge is nearing that figure annually, but again not as fast as the rates of new cases filed.

Some court watchers believe that increased case volume is the primary cause of delay. They argue that solutions should emphasize devices to reduce the workload and include such suggestions as increasing the number of judges and other personnel to assist the court; establishing separate appellate courts for criminal and civil cases; increasing court control of caseload by implementing selective review; reducing the length of opinions and briefs; and issuing memorandum opinions and oral decisions instead of written opinions.

Others believe that the delay is the result of poor court administration and believe courts should concentrate on

Concluded on following page

How the Appellate Court works

THE ILLINOIS Appellate Court was constitutionally established by a judicial article approved by the voters in 1962 and effective in 1964. Prior to the new article, the intermediate courts operated under statute with judges assigned by the Supreme Court from the trial court bench.

The most important aspect of the new judicial article was that the Illinois Supreme Court's mandatory appellate jurisdiction was cut drastically and its discretionary jurisdiction was increased. The 1964 judicial article was essentially retained in the 1970 Constitution.

There are five appellate districts: Cook County is the first district, and the remaining counties are divided into four districts. Elgin is the seat of the second district, Ottawa the third, Springfield the fourth, and Mount Vernon the fifth. By law, each district must have at least one appellate division, but there may be more. The first district has five divisions; the second has two; and the third, fourth and fifth distance each have one division. The Illinois Constitution requires that each division have at least three judges, but the legislature has provided for the election of 18 appellate judges from the first district and four from each of the four downstate appellate districts. If more judges are needed, the Supreme Court has the authority to assign other judges from circuit courts or even out of retirement to serve in the various divisions.

In each division, on one day a week, oral arguments are heard in the courtroom. Four or five arguments are scheduled each day, and each argument is allowed 30 minutes. Emergency cases might also be heard by the presiding panel of judges. Following arguments, a panel conference is convened and a vote taken. The decision details are often then put in a written opinion. The average length of an Illinois Appellate Court opinion is over six pages, which is rather lengthy compared with other states.

Judicial appellate function is twofold: review for correctness and institutional review. Those functions serve to maintain the accountability of the lower trial court and to promote uniformity in judicial decisionmaking.

such efforts as employing central staff review procedures; developing computerized record keeping systems; developing screening systems and alternate dockets for separating error-correcting cases from cases dealing with fundamental legal questions; and implementing systems of centralized court administration.

Clearly there is no single answer to the growing number of cases being filed annually, but the National Center for State Courts has developed several suggestions for improving procedures. The center recommends assigning cases according to backlog, specifying time limits for written opinions, developing reassignment procedures and sanctions for delinquent cases, and eliminating scheduling policies that limit the number of cases heard.

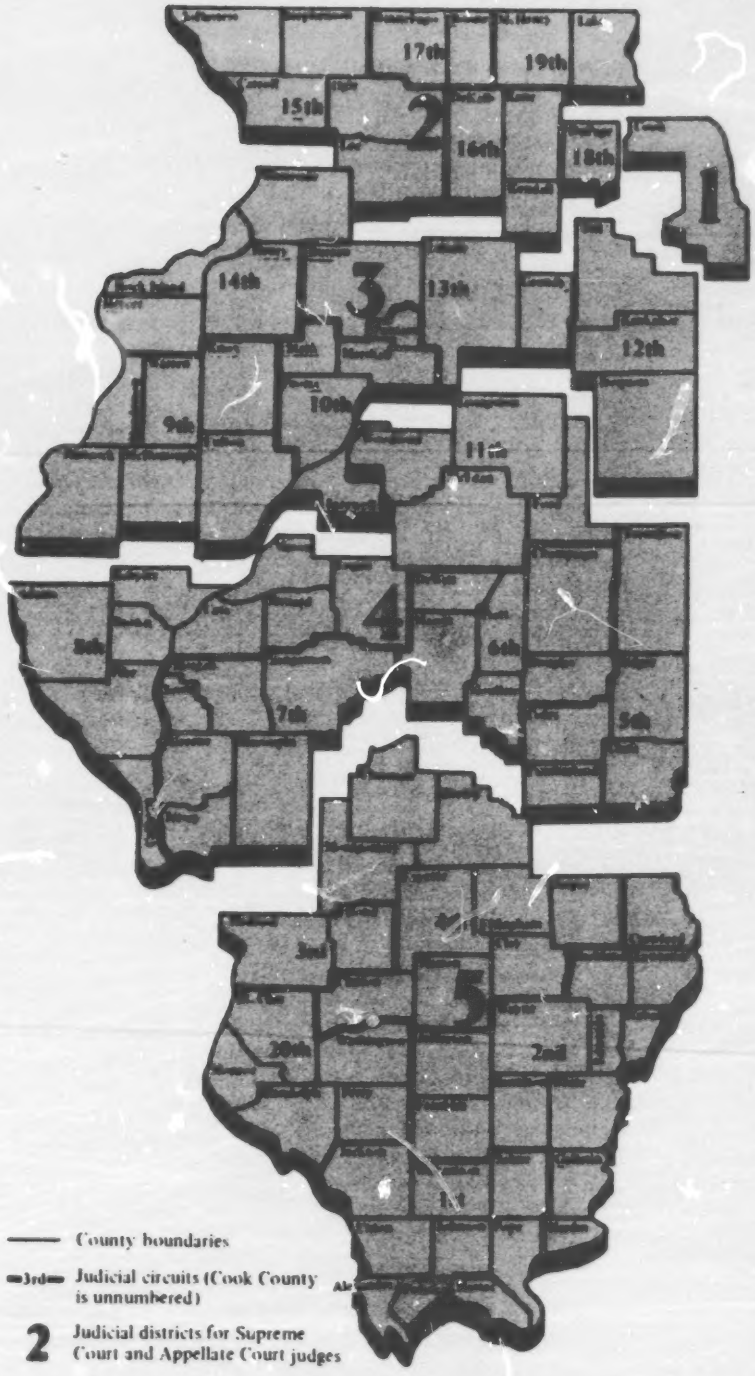
The center's comparison of state appellate courts indicated courts with "formal control of the appellate caseload at all phases of the appellate process exhibited substantially faster case processing time averages than courts which did not have formal control." The center has urged adoption of scheduling policies which do not artificially limit the number of oral arguments heard monthly, implementation of rules specifying when materials under the control of attorneys, court clerks and reporters must be filed, and specification of the length of time between oral argument and submission of written opinion.

The Illinois Appellate Court does not currently have an effective system for tracking cases, and that deficiency makes periodic evaluations difficult. The center recommends keeping careful records of dates to help identify cases long overdue and to allow for a more systematic study of the appellate court's sluggish nature.

"The problem isn't trying to figure out what to get out of the court system, the problem is to try to figure out how to handle what's in it," Judge Craven said. "I don't worry about the volume. The court system can handle the volume. It's a question of having the resources, the physical facilities to handle it."□

Janeen Burkholder was the Public Affairs Reporting intern for United Press International in the State House when she wrote this article during the 1981 legislative session.

Judicial districts and circuits for Illinois courts



BEST COPY AVAILABLE

SANGAMON STATE UNIVERSITY ■ SPRINGFIELD, IL 6270

capitol commentary

A Student's Newspaper About Politics and Government

IN THE CLASSROOM

Dear Reader:

If you are a high school teacher and have found *Current Illinois Legal Issues* to be useful as a class resource, you may be interested in *Capitol Commentary*, a civics education newspaper for students. Published quarterly by *Illinois Issues* and Sangamon State University's Legislative Studies Center, this quarterly newspaper is distributed **free** to approximately 30,000 high school students statewide.

.....

***Send to* Melinda Kwedar, Editor, *Capitol Commentary*, K-80J, Sangamon State University, Springfield, Illinois, *or call* 217/786-6084.**

____Yes, I would like to receive *Capitol Commentary* for use in my classroom.

.....

Name of instructor

.....

Name of high school

.....

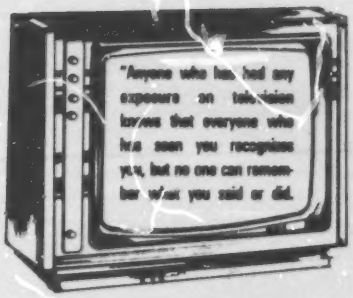
Address

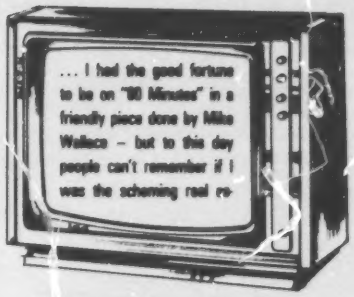
Reprinted from *Illinois Issues*, April 1981

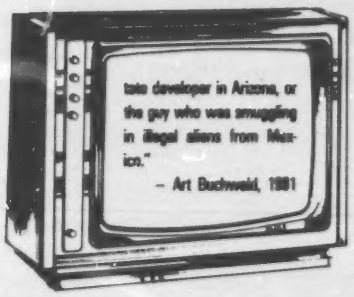
Cameras in the courtroom:

Will Illinois be next?

By MIKE STRAND


"Anyone who has had any exposure on television knows that everyone who has seen you recognizes you, but no one can remember what you said or did.


... I had the good fortune to be on "60 Minutes" in a friendly piece done by Mike Wallace – but to this day people can't remember if I was the scheming real



ON THE morning of January 26, 1981, a somewhat startling shift in U.S. judicial policy sent tremors rippling through the American journalism and legal communities. All but reversing itself on a 1965 decision, the U.S. Supreme Court had ruled 8-0 that a television camera inside a Florida courtroom did not violate or present an inherent threat to the 14th Amendment rights of two Miami Beach policemen convicted of theft.

Noel Chandler and Robert Granger were the two policemen accused of stealing $3,000 from a Miami Beach restaurant in May 1977. Their trial drew considerable media attention, including television cameras which were permitted under Florida statute to film in the courtroom over defendants' objections. Both men appealed their seven-year sentences on the grounds that television had prevented them from having a fair trial.

The Supreme Court did not agree and noted that in their appeal, the policemen "offered nothing to demonstrate that their trial was subtly tainted by broadcast coverage — let alone that all broadcast trials would be so tainted." The Florida statute had passed the test in *Chandler* v. *Florida*.

By its ruling, the Supreme Court has said it is constitutional for criminal trials to be open to TV cameras, as well as regular cameras of the print media and tape recorders of the broadcast media. It represented a major breakthrough in media coverage of the courts, and is expected to have significant impact on the journalism and legal communities in Illinois.

Inspired by *Chandler*

Besides Florida, 26 other states (see chart) have already established either experimental or permanent rules for televised trials. In Illinois, however, the state Supreme Court has consistently rejected any proposals for experimentation with the broadcasting of court proceedings. But in light of the *Chandler* decision, it now appears the Illinois Supreme Court is willing to review its unyielding policy against cameras and microphones in Illinois courtrooms.

Banking on a change of heart by the Illinois court, media-bar organizations made hasty attempts to again try and spur the justices to relax the ban.

Just a week after the *Chandler* decision, the Fair Trial-Free Press Committee of the Illinois State Bar Association (ISBA) approved a resolution that requests a one-year test period at the trial and appellate court levels. The ISBA committee is composed of members from the bar, bench and media, and is chaired by Chicago attorney Joel Weisman.

"Coverage of court proceedings by electronic means is a step that should be taken," according to Weisman in a prepared release announcing the resolution. He said, ". . . it is essential that courts allow reporters to use the tools of their trade as long as the rights of trial participants are protected." The resolution as of March 16 was awaiting final approval from the ISBA's Board of Governors before a formal petition could be issued.

Meanwhile, a smaller, so-called "progressive" bar association was taking even quicker action. The Chicago Council of Lawyers, a group of about 1,500 attorneys, formally approved a similar resolution on March 2 and formally petitioned the high court March 6 for an experiment with cameras and microphones. In 1975, the council had petitioned the court for a similar test, but was turned down without explanation five months later.

The new petition, according to the council president, Robert Graham, requests experimental media coverage using cameras and microphones "under specific, limited circumstances."

"On the experiment question," said Graham, "we come down suggesting that all parties [involved in litigation] would have to agree [to electronic news coverage] beforehand. That's primarily because a witness has [under current Illinois law] a right to object." Any rule that would allow cameras to record without witness' consent, Graham believes, would require not only permission of the court, but also approval by the Illinois General Assembly to change the law (*Ill. Rev. Stat.* 1977, ch. 51, sec. 57).

Not all bar associations are enamored with the possibility of having cameras in the courts. Eugene I. Pavalon, president of the Illinois Trial Lawyers Association (ITLA), admits that the *Chandler* ruling will probably pry open courtroom doors for TV, radio and newspaper photographers, but it will not eliminate the residual feeling of disapproval among lawyers. "I don't like it," he says, "but I guess we'll have to live with it. I will push for the most stringent rule to make as unobtrusive as possible any type of camera in the courtroom."

Attorney Robert Bennett of the Northwestern University College of Law, says attitudes like Pavalon's are common in Illinois' legal community. Bennett, who drafted the Chicago Council of Lawyers' petition, says many attorneys now support the media position only because they are resigned to the implications that the *Chandler* ruling will have in courts across the country. "I don't think there's any strong [legal] constituency for bringing cameras into courts," says Bennett. "There's not a lot of self-interest [among lawyers]. It is more an attempt at bringing courts into the 20th century [to aid the] free flow of information."

Background for ban

Until the mid-1970's, most states were still rigidly adhering to the strict precept of Canon 35 of the American Bar Association's Canons of Judicial Ethics. That canon (which never had the force of a law) effectively banished

'. . . it is essential that courts allow reporters to use the tools of their trade as long as the rights of trial participants are protected'

electronic news equipment from many courtrooms throughout the nation and came about, in 1937, as a result of the flamboyant and outrageous trial of Bruno Hauptmann in 1935. Hauptmann was convicted and sentenced to death for the kidnap-slaying of the Lindbergh child in a circus like courtroom atmosphere created, in large part, by the media.

Surprisingly, most broadcasters at the time treated the ABA's grave decision with almost total disinterest. And failing to learn from their mistakes in covering the Hauptmann trial, television and radio journalists inflicted another near-fatal blow to broadcast court coverage 25 years later.

It was in a cramped, second-floor courtroom in Tyler, Texas, in which television and radio technicians laced the room with cables and wires for the September 1962 trial of financier Billie Sol Estes on swindling charges.

All three television networks (ABC, CBS, NBC) descended upon the Smith County courthouse for a two-day preliminary hearing with the intensity and competitiveness normally reserved for rocket launchings or political conventions.

Despite the restraints placed on broadcasters and print photographers by the trial judge, the United States Supreme Court ultimately held, in a 5-4 ruling, that Estes was deprived of a fair trial in violation of the due process clause of the 14th Amendment.

Although the court's ruling was not, per se, a blanket prohibition against televising state criminal trials, the net effect was the same. In other words, *Estes* may not have killed cameras in the courtroom, but it left the issue in critical condition.

"The right of the communications media to comment on court proceedings," wrote Chief Justice Earl Warren, "does not bring with it the right to inject themselves into the fabric of the trial process to alter the purpose of the process."

Although the high court had shut the door, it was not locked. Justice John Marshall Harlan, in another concurring opinion, laid the groundwork for future judicial acceptance of televised trials. Harlan agreed that Estes had been denied a fair trial. But even so, he suggested that "the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. If and when that day arrives, the constitutional judgment [in *Estes*] would be of course subject to reexamination . . . ."

But in 1978, the Illinois Supreme Court had evidently not yet accepted television as a commonplace affair as Justice Harlan had predicted it would be and sent down bad news for Illinois broadcasters. Harold Fuson, a communications law professor at the University of Illinois, received a letter on May 27, 1978, that he and many others

States with permanent rules permitting broadcast coverage

Alabama, with consent of all parties (enacted February 1976)
Alaska, with consent of all parties (enacted November 1979)
Colorado, with consent of all parties (enacted February 1956)
Florida, by discretion of judge (enacted May 1979)
Georgia, with consent of all parties in trial and appellate courts (enacted May 1977)
Idaho, with consent of all parties, only in Supreme Court (enacted June 1979)
Nevada, open (enacted April 1979)
New Hampshire, only Supreme Court (enacted January 1978), trial courts open (enacted January 1979)
Texas, education purposes only, trial coverage pending (enacted November 1976)
Washington, by discretion of judge (enacted September 1976)
Wisconsin, by discretion of judge (enacted July 1979)

States with experimental trial coverage

Arizona (May 1979-May 1980)
California (May 1980-May 1981)
Idaho, exclusive of Supreme Court (October 1979-October 1980)
Iowa, by discretion of judge (January 1980-December 1981)
Louisiana (February 1978-February 1980)
Minnesota, Supreme Court only (since January 1978)
Montana (April 1978-April 1980)
New Jersey, one-day test (December 12, 1978); two counties, limited to maximum of six trials (May 1979-May 1980)
New Mexico, with consent of witnesses and jurors (since August 1978)
New York, one day in appellate court (August 16, 1979)
North Dakota, Supreme Court only (February 1979-January 1980)
Ohio (June 1979-May 1980)
Oklahoma (January-December 1979)
Pennsylvania (October 1979-September 1980)
Tennessee (for a "reasonable period" since February 1979)
West Virginia, one county (January-June 1979)

States where courts have been petitioned to permit broadcast coverage

Arkansas, filed October 15, 1979
Maryland, filed September 25, 1979

Source: *Media Law Reporter*, Vol. 5, January 22, 1980.

had hoped would never arrive.

The letter was from the clerk of the Illinois Supreme Court notifying Fuson (who then was serving as counsel for the 250-member Illinois News Broadcasters Association [INBA]) that an INBA petition, which urged the court to lift its ban (Rule 61) on cameras and microphones in Illinois courtrooms, had been denied.

Although not entirely unexpected, the ruling was greeted with considerable dismay, and it alarmed many in Illinois' broadcast news industry because the justices never explained why they had turned down the INBA's request. "The disturbing thing about the ruling," said Fuson, "[was] not so much the decision, but [that] the court refused even to discuss the matter."

Ten years earlier, this decision (which took 36 days) wouldn't have surprised anyone in radio or television news. Back then, a petition like the INBA's would probably have been labeled futile from its inception, given the stormy relationship that existed between the entire U.S. justice system and the broadcast media.

Age of electronics

The pervasiveness of television that Justice Harlan foresaw 16 years ago has indeed arrived, and today the "tube" is an ingrained part of the modern American lifestyle.

We are living in an age when 97 percent of all U. S. homes have one or more television (and radio) sets — a distribution roughly matching that of indoor plumbing. In addition, nationwide polls (both Harris and Gallup) have indicated that a sizable majority of all Americans obtain the bulk of their news and information from television and radio.

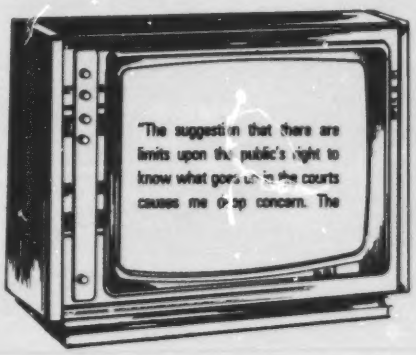
Illinois courtrooms remain a protected warren. They are the last vestige in state government of political isolation from the revealing eye of the camera and indiscriminate ear of the tape recorder.

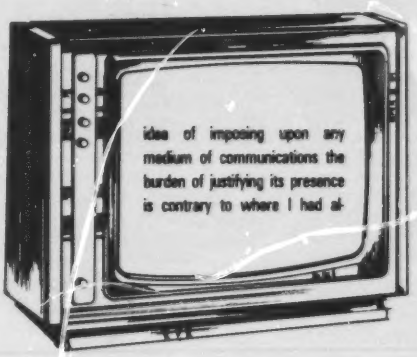
Meanwhile, other states have responded to TV's technological catharsis, and its part-of-the-family acceptance by most people. Media organizations began several years ago taking steps to regain the judiciary's confidence in the electronic news industry. And, in some states, those attempts have succeeded quite well.

On July 5, 1977, with routine court dockets and dozens of cameras, the much heralded Florida test of television in the courtroom began.

One of the more celebrated (and somewhat ironic) cases argued before the cameras during this experimental period in Florida was attorney Ellis Rubin's unique, though unsuccessful, "television insanity" defense of a 15-year-old boy accused of murder. "I think the experiment [went] very well," said Sandy D'Alemberte, the attorney who prompted the Florida test.

The order allowing courtroom photography in Florida was simple and did not require the permission of any party involved. Restrictions followed later, giving the judge discretion over what testimony could be filmed or recorded. The court also limited Florida's media to one television camera and one still photographer per courtroom. Flash photography was barred, and cameramen were limited to a designated court seat. On the county level, local rules of





conduct were fashioned by media representatives and the judiciary.

The Florida experiment ended on July 1, 1978, and less than a year later the organizers and promoters of TV in the courtroom were told they had passed the acid test.

On May 1, 1979, Florida's Canon 3A(7) was repealed, and the courts opened their doors to broadcast journalists for the first time as a rule instead of an exception.

Efforts similar to the Florida experiment, which helped to demystify television, have had positive effects in opening courtroom doors in other states. Media attempts to educate attorneys and judges on the rapid technological breakthroughs in broadcasting since the early 1960's have had promising results.

Question of witnesses

In Illinois, members of the Illinois State Bar Association (ISBA) have slowly been persuaded that changes in Illinois' judicial standards should at least be considered.

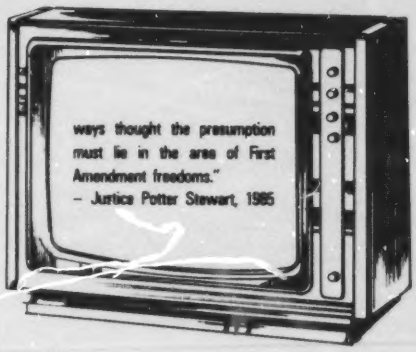
Following the *Chandler* decision, ISBA President Robert G. Heckenkamp restated his organization's position that while they do not endorse the use of cameras in courtrooms, the Supreme Court decision "may prompt a re-examination of the existing rule . . . that flatly prohibits their use." Heckenkamp said there are still other problems to consider, including what effect the presence of cameras might have on witnesses (i.e. minor children who are called to testify), jurors and other trial participants.

However, the vast improvement in media-bar relations has apparently affected the Illinois Supreme Court's outlook on the cameras-in-the-courtroom question. In October of 1980, Chief Justice Joseph H. Goldenhersh told a news broadcasters' convention in Springfield that he and possibly some of the other justices were reconsidering their positions. The chief justice hinted that contingent upon the ruling in *Chandler*, Illinois might even begin a trial period of its own for electronic court coverage.

Goldenhersh admitted that after observing several demonstrations with the newer types of television equipment, his opinion had "shifted from being unalterably opposed to where at least I have an open mind on it," he said. "And I thought that a [trial court] proceeding could be televised without disrupt[ion]."

Following the *Chandler* decision, Goldenhersh was asked how the Illinois Supreme Court might respond to another petition for experimenting with televised trials. "Well, I think that perhaps [the media organizations] might find us a little more amenable to it, but I still would not predict what the individual justices [would] want to do about it.

"There's a lot of [negative] feeling by lawyers, and several of the [attorneys] associations are strongly opposed to it, and [they] make some very cogent arguments in opposition. So, before I would vote on it, I would want to refresh my memory on just what the pros and cons are. And before the court would make any commitment, we would want to have a pretty thorough



investigation and presentation on it."

So what efforts must the media make?

"They've got to come to grips with the disruptive effects [of hauling around equipment and people]," professes Northwestern's Robert Bennett. "If in the early days [of a test period] there are a couple of unpleasant incidents, it might gut it. They must be careful in going about their business."

Bennett's sentiments are, in fact, echoed by some reporters, who see an experiment as a chance to sell the Supreme Court on the idea of new, permanent rules allowing electronic coverage.

"Most importantly, it will take responsible action on the part of journalists," said Patrick Gordon, a Springfield radio newscaster and member of the ISBA Fair Trial-Free Press Committee. "One of the concerns that I have," he says, "is that someone is going to do something gross and just mess it up for everybody else [during a test period]. I hope that doesn't happen; that's what would blow it and spell trouble for all of us."

One major flaw in broadcast reporting, as seen in the minds of many lawyers, is the superficial or incomplete coverage that TV and radio devote to their stories. Gordon believes that's a myth. "What we need to do," he says, "is convince them that's all that's really happening now. All news is a distillation of facts rather than a complete recitation of [the event]. Just as a print reporter, or any reporter now sits in the courtroom with pad and pencil and jots down portions of testimony to report on later [that] is essentially the same thing that's going to happen if we have a camera in there." Gordon says the only significant difference will be actual scenes and sounds of the case unfolding, instead of reporters trying to rehash the sequence of events from memory or notes.

But the impact on witnesses who become integral parts of the media's court stories deeply concerns attorneys like Pavalon of the ITLA, who believe such an influence could discolor trial testimony and prevent courts from finding the truth.

"Without cameras," says Pavalon, "I think that the [courtroom] environment . . . is more conducive for people to tell the truth. I'm not saying that their testimony [before cameras] will differ 100 percent of the time. [But] if it could affect one out of a hundred witnesses, why bother? What advantage is there to the public in having them filmed, rather than reporting the story as it's presently done?

"I know what the advantage is to the media, of course," says Pavalon. "It might make their news programs a little more entertaining at night. But I think the trade-off is not worth it."

Beneath the veneer of a First Amendment victory for the news media, there lies a fine-print warning that limited restrictions on the use of television in the courts are still appropriate and warranted where necessary. For example, in the unanimous high court opinion in *Chandler*, Justice Burger talks of how "an *absolute* [my emphasis] Constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger that, in some cases, prejudicial broadcast accounts of pretrial and trial events may impair the ability of jurors to decide the issue of guilt or innocence, uninfluenced by extraneous matter." However, that does not preclude the court in the future from making a less sweeping judgment against television.

In addition, although the justices reaffirmed that *Estes* did not slap an absolute ban on state experimentation of televised court trials, they neither endorsed nor invalidated the practice in Florida. And although the decision is likely to give added impetus to the state-by-state drive to roll back Canon 35, there was no outpouring of restored faith or trust in broadcast journalism exhibited in the Supreme Court's formal opinion.

Challenge to media

In effect, what the high court has done is to take a laissez-faire attitude towards the camera-in-the-court question, making it a minor victory for states rights. But by not overturning *Estes*, the Court has reserved the right to review future challenges to broadcast and/or photographed trials. In other words, *Chandler* has provided television journalists both a tremendous opportunity to vindicate the broadcast medium's notorious reputation in covering the courts, and also enough legal rope to hang themselves if the job is again done improperly.□

Mike Strand is the legislative correspondent for Sangamon State University's public affairs radio station, WSSR-FM, and is a member of the Freedom of Information Committee of the Illinois News Broadcasters Association.

Reprinted from *Illinois Issues*, February 1978

By ED NASH

Is it a protection for citizens or an instrument for prosecutors?

The grand jury system

SHIELD OR SWORD? Is it the "true tribunal of the people" or is it an administrative arm of the prosecutor in criminal cases? The questions are about the grand jury system and they have been debated for more than a century in Illinois. Now, with the new Illinois Constitution in effect and with increased interest on the federal front, the debate has increased in intensity.

Surprisingly, there has been relatively little change in the grand jury system which the United States and its individual states inherited from Great Britain where its history dates back more than eight centuries. Illinois, however, may be the No. 1 exception in the Union.

Contrary to some misconception, King Henry II established the "Grand Assize" in 1166 to gather information about criminal activity from the citizenry. It took more than five centuries for the classical argument in favor of the grand jury system to develop: That it stands between the people and the state, specifically between an accused citizen and the prosecutor. The argument rests on the belief that the grand jury prevents the prosecutor from bringing an unfounded charge against a totally innocent person for malicious reasons or without sufficient cause. This idea evolved from a 1681 case in which an English grand jury refused to grant the request of the king's prosecutor for an indictment against a nobleman accused of treason. Thus was born the concept that citizens on a grand jury would countermand an overzealous or malicious prosecutor with a weak or contrived case, particularly in a charge of sedition.

The grand jury was a well-established institution by the time of American colonization, and it was firmly rooted in the British soil of North America. At the time of the American Revolution, grand juries were understandably popular because, in many cases, they stood between American patriots and the Crown's prosecutors. It was little wonder that, when the U.S. Constitution was drafted, the grand jury system was incorporated into the Bill of Rights to protect the citizen from unjustified prosecution. And the U.S. Supreme Court has consistently upheld it, declaring in *Hoffman v. U.S.*: "The most valuable function of the grand jury is to stand between the prosecutor and the accused."

'It has become in effect an administrative arm of the office of attorney general or district attorney'

The states of the Union followed suit in their state charters, Illinois among them. Since that time, however, the feeling has developed that, in the hands of a determined and/or publicity-seeking prosecutor, the grand jury has become a sword rather than a shield for the citizen, that it has become easier and easier for prosecutors to use the grand jury as an instrument for their own purposes.

The new Illinois Constitution apparently recognized this perception when its framers eased the requirement for altering the grand jury system. The previous, century-old state Constitution (Art. II, Sec. 8) provided only for total abolishment "by law in all cases" of the grand jury system; no alteration was permissible except its total elimination. The new Constitution (Art. I, Sec. 7) provides that the Illinois General Assembly may abolish the grand jury "or further limit its use," which opens the way for possible changes in the system. But the questions remain: Is the grand jury sword or shield? Or, in the words of James P. Shannon, former president of the College of St. Thomas in St. Paul, Minnesota, is it "the true tribunal of the people" or an arm of the prosecutor?

While a law school student in New Mexico five years ago, Shannon wrote that Thomas Jefferson — in a petition to the Virginia General Assembly — termed the Anglo-Saxon tradition of trial by grand and petit jury "the true tribunal of the people." However, Shannon has said more recently that "numerous weaknesses in the modern operation of the grand jury system have come to light . . . [it] has become in effect an administrative arm of the office of attorney general or district attorney, it no longer enjoys public confidence, is frequently a device for the miscarriage of justice."

Nevertheless, the grand jury system remains in the U.S. Constitution. There has been no tinkering with the Bill of Rights since 1789, and 28 of the 50 states in the Union require grand jury indictment either by constitution or statute. But during this decade in Illinois, there have been efforts to change the grand jury system drastically.

Advocating a commission to study it, state Rep. John S. Matijevich (D., North Chicago) said in 1973 that "we must determine whether the initial

ED NASH
Public information officer for the Department of Registration and Education. Nash was political editor of *The News-Sun*, Waukegan, from 1969 to 1977.

purpose of the grand jury to stand as a safeguard between the prosecution and the accused is still preserved under the present system . . . if it is no longer the buffer that it was intended to be, we might be better to replace the grand jury with the information and complaint process."

Writing in the *University of Illinois Law Forum* the same year, then state Rep. Brian B. Duff (R., Wilmette) and Arthur E. Harrison, a House Judiciary Committee counsel, said: "The grand jury serves at best no useful purpose, and at worst may be subject to abuse by a prosecutor with either personal or political motives . . . it is a rubber stamp for the state's attorney and not an independent institution protecting a defendant's right."

Then, two years ago, then Gov. Dan Walker signed into law legislation which some lawyers (including Duff, now a Cook County Circuit Court judge) said brought the most significant changes in the grand jury system in Illinois history. Considered the key bill in the series was one that permitted a state's attorney to bypass the grand jury and prosecute a felony case by filing with the court an information, a formal charge drawn by his office equal to an indictment from a grand jury.

Duff, who handles felony cases in circuit court, says that the most significant bill in the approved package was the one which provides that a person charged with a crime or the target of a grand jury probe can have his lawyer in the grand jury room with him. "That is the first real modification of the nature of the grand jury itself," Duff contends, and Illinois was the first state in the Union to make it state law. For some reason, he adds, "The existence of the Illinois law has been little noted."

The third bill in the grand jury series enacted into the law in 1975 was one that provides that a transcript be made of the prosecutor's questions and witnesses' answers during the secret grand jury sessions. The "bypass" law definitely has decreased the use of the grand jury, Duff says, and has also decreased the time for a trial to get under way. "It used to take three months to get an indictment in Cook County," he points out. That was critical because of the Illinois law which says that no more than four months can ensue between when a person is arrested and when he must go to trial, unless the defendant himself has caused any delay.

Greg Mansfield

An attempt was made to amend the law last year in the General Assembly, to give prosecutors a new 160-day pretrial period after a defendant out on bond caused a trial delay. The change would have exempted those on bond from suspension of the time rule covering those in custody. The change passed the legislature but died when the governor made an amendatory veto to clarify the bill (S.B. 728), and an override attempt failed in the House. Otherwise, the defendant goes free without trial. One result of the "bypass" law, the lawmaker-turned-judge says, is that smaller counties in Illinois "do not use the grand jury at all."

Capsulizing the three grand jury laws in Illinois, Duff says: "The 'bypass' has decreased the use of the grand jury . . . the transcript has brought reporting of the grand jury . . . and the lawyer-in-the-grand-jury-room has modified its actual nature." Reiterating what he said the day the three grand jury bills were signed into law, Duff calls it "a happy day for the criminal justice system."

In their 1973 article, Duff and Harrison cite statistics to back up their contention that "generally speaking, the grand jury often degenerates into a rubber stamp wielded by the prosecutor." In the early 1930's, they said, University of Oregon Law School Dean Wayne Morse (later U.S. senator from Oregon) studied 162 prosecutors in 21 states, including Illinois, and out of 6,453 cases in which the prosecutor expressed his own preferences, the grand jury disagreed on only 348 — 5 per cent. Further, they said, statistics can be misleading. A 1964 study of the Cook County grand jury, they said, revealed that, out of 4,239 indictments sought, the grand jury returned 3,862 true bills (indictments) and 377 no-bills — some 10 per cent — refusals to indict. They said, however, that an assistant state's attorney working with the grand jury for more than two decades estimated that about 90 per cent of the no-bills came from such a practice as knocking out all the charges against a defendant except the one for which he was indicted. In the final analysis, they said, the "best balance of interest — saving time and resources, minimizing abuses and limiting the amount of politics in political cases — requires elimination of the grand jury indictment, with one exception." Their lone exception was cases of official misconduct, where they would have a panel of citizens make the determination of probable cause.

It is ironic, perhaps, that while the questions persist over the future of both county and federal grand juries, Gov. James R. Thompson and Atty. Gen. William J. Scott have joined forces to push for passage of legislation to permit a statewide grand jury system in Illinois. Although many might argue against the specific proposal, few would quarrel with what the governor stated was its purpose: "To permit the attorney general to attack consumer fraud and other abuses of the public on more than a countywide scale [to] benefit all law-abiding Illinoisans." Such measures have been offered in the General Assembly before and, thus far, have met defeat.

Meanwhile, the American Bar Association (ABA) and the Congress are getting into the grand jury act. Meeting in Chicago this summer, the ABA House of Delegates voted, by a 2 to 1 margin, for a proposition that witnesses before a grand jury should have the right to be accompanied by an attorney. There was little note that such a provision had been the law in Illinois since 1975. Under the proposal, lawyers are allowed to advise their clients but are forbidden to take any active part in the grand jury proceedings. In almost all states, a witness before a grand jury must leave the grand jury room to consult with his lawyer, who is forbidden entrance. Backers of the ABA measure said that the frequent trips in and out by a witness give an impression of guilt and increase

the possibility of his indictment if he is being investigated.

U.S. Atty. Gen. Griffin B. Bell, on record in favor of grand jury reform in principle, told the ABA House of Delegates that the "remedy proposed is much broader than the wrong you have found" and could damage the grand jury process by "overkill." Another opponent, Benjamin Civiletti, chief of the U.S. Department of Justice Criminal Division, said that the proposal would "impede fact-finding by the grand jury," particularly in cases involving organized crime, drug abuse and white-collar crime."

At the same time, Richard E. Gerstein, Dade County (Fla.) state's attorney and chairman of the ABA's Grand Jury Committee, told the ABA convention that grand juries are in danger of being abolished or having their power cut severely unless major changes are made to curtail abuses by over-zealous prosecutors. "We want to preserve the system," Gerstein was quoted, "because, when it functions as it was intended, it can be an effective buffer between innocent people and the state, and it gives citizens a chance to participate in the criminal justice system." Both Civiletti and Gerstein were touching apparently, too, on the independent investigatory powers of the grand jury, which critics say grand jury members rarely know about or utilize to the fullest extent.

Grand juries can be an effective buffer between innocent people and the state

Currently in Washington, a U.S. House Judiciary Committee subcommittee is taking expert testimony on the grand jury system. It has been pointed out that from 1970 to 1973 during the administration of former President Richard M. Nixon, agents of the Justice Department convened some 100 grand juries in 80 cities in pursuit of various radicals. There were far more jail terms for contempt of the grand jury (refusal to answer questions) than convictions on charges sought by the department.

In a new book published in June 1977 by Hill and Wang, *The Grand Jury: An Institution on Trial*, U.S. Judge Marvin Frankel and Attorney Gary Naftalis state that the grand jury "has served too often to harass the unorthodox and the unpopular." Among reforms they suggested — and incorporated in a bill introduced by U.S. Rep. Joshua Eilberg of Pennsylvania — is the one endorsed by the ABA delegates (and part of Illinois law): to permit a witness to bring his attorney into the grand jury room. Others would limit jailing for refusal to answer questions to six months, instead of the present limitless term, and completely immunize a witness from prosecution for any offense discussed during his appearance.

Meanwhile, opinions about the grand jury system continue to vary. U.S. District Judge William J. Campbell, the retired former chief judge in Chicago, says that "the grand jury is the total captive of the prosecutor who, if he is candid, will concede that he can indict anybody, at any time, for almost anything, before any grand jury." But the late Casper Apeland, longtime chairman of the Lake County Jury Commission, which interviews and assigns residents of the county to both grand juries and trial court juries, used to call grand juries "public watchdogs." Apeland said, "Grand juries have authority and power which is delegated to no other public body. Not only do they bring indictments in cases brought to them by the state's attorney; but they can initiate their own investigations of public officials . . . in effect, they are public watchdogs."

Disagreeing, Melvin M. Belli, the noted trial attorney, says, "The grand jury is the second most outdated and unprotective of the individual systems remaining in today's otherwise good American trial law." (Belli's first: the coroner system.)

Two others take a middle ground. Paul M. Lukes, writing in the spring 1969 *John Marshall Journal of Practice and Procedure*, recommends that the indictment function of the grand jury be replaced by an information system, while the grand jury be retained in its investigatory capacity." Richard M. Calkins, a Chicago lawyer, says that "adoption of the dual system, the state's attorney's information and the grand jury's investigation, would give Illinois a more efficient and economical judicial system."

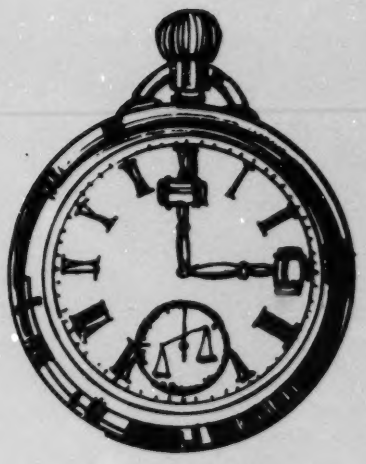
For what it is worth, Great Britain, the nation where it all began, abolished the grand jury by Act of Parliament in 1933 — 45 years ago. Citing that historical fact, Shannon, the college president turned law school student, can probably be forgiven for placing tongue in cheek and stating: "A span of four decades is a decent interval for us to allow before rushing to adopt any innovation in the law merely because the English have done it already."□

Reprinted from *Illinois Issues*, June 1981

Justice delayed: Illinois and its Speedy Trial Act

By MARILYN J. RICE

The wheels of justice grind exceedingly slow — and to many in the criminal justice system that is just the problem. The Illinois legislature's response to long felony trial delays was the Illinois Speedy Trial Act, which sets time limits within which a defendant must be tried. But the act contains no penalties for violations, and criminal trials actually take longer now than before it was passed. This article examines the reasons for this, and compares Illinois' attempts to speed justice with those of other states and the federal government.



"EVERY PERSON in custody in this state for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date he was taken into custody. . . . Every person on bail or recognizance shall be tried by the court having jurisdiction within 160 days from the day defendant demands trial. . . . Every person not tried in accordance with such provisions shall be discharged from custody or released from the obligations of his bail or recognizance."

This is the heart of the Illinois Speedy Trial Act (*Ill. Rev. Stat.* 1979, ch. 38, sec. 103-5). In spite of the seemingly unequivocal wording of the statute, the average felony case resolved in Cook County in the first five months of 1979 was 448 days old, according to a statistical study conducted last year by the privately funded Chicago Crime Commission. Other metropolises deal with their accused felons in one-third to two-thirds that time. In Detroit, the average case takes 230 days; in Washington, D.C., 224 days; in Los Angeles, 132 days; and in New Orleans, 102 days.

In 1974, the year before the Illinois Speedy Trial Act was amended to resolve the problem of unnecessary, abusive delays in case dispositions, Cook County's average felony case lasted 352 days — a full quarter year less than it took in 1979.

In the 18 months Cook County's felonies linger in limbo, our system of justice is compromised. Victims, witnesses and citizens may lose faith in the system. Memories fade, residences change, and the tenaciousness of attorneys may falter. Justice delayed becomes justice denied.

The Chicago Crime Commission's statistical findings were the springboard for six months' research into how to cure a problem that threatens to make justice in Cook County a matter of mere manipulation in the meting of crime and punishment. In the course of this research, over 60 judges, attorneys, law enforcement officials and educators discussed their perceptions of the problem and their suggestions for change. The overwhelming consensus was that Illinois' amended Speedy Trial Act insures neither speed nor efficiency. Said a prominent Cook County defense attorney: "There is little judicial emphasis on prompt dispositions in state courts. The defendant can ask for many continuances, but once he answers 'ready,' the state can still ask for an unlimited number of continuances."

There was further agreement that common legal procedures conspire to take advantage of the loopholes in the law. According to Norval Morris, former dean of the University of Chicago Law School and member of the Chicago Police Board, "the structure of charge and plea bargaining fuels the continuance. If we could solve [one of] the problems relating to either the continuance, speedy trial, or charge and plea bargaining, we would have solved them all."

The problem of delayed justice is not unique to Cook County, but the enormous populations, massive caseloads and cumbersome court structures make it critical there. The 256-square-mile county includes six courthouses, where 22,672 felonies were processed in 1979. Of that number, 18,074 were disposed of by year's end. Most of those were resolved by plea bargaining.

The 'clock' and justice

Continuances — adjournments or postponements of action — are the major causes of delays despite the unequivocal language of the Speedy Trial Act. Such continuances are allowed whenever the court believes the interests of justice require them, and fair and impartial hearings, of course, demand some leeway in the law. But the leeway in Illinois' Speedy Trial Act is large: the act's wording permits manipulation by continuance. Though promoting justice is the intended purpose of continuances, other purposes appear to be served.

Although legislation to regulate the course and duration of justice has been regularly introduced in the Illinois General Assembly, none has passed since the Speedy Trial Act of 1975. Before the statute was amended in 1975, continuances granted within the 120-day limit turned the trial "clock" back to day one. The 1975 amendment sought to close this loophole. Under its terms, the clock no longer reverts to

day one but remains stationary until the date stipulated by the continuance. But the amendment has failed to produce the desired effect of speeding up the trial clock. This is not surprising, since the statute contains no penalties for violations. As of 1979, the average time elapsed between arrest and disposition rose 30 percent from 1974.

There are six parties to the system of justice: the prosecution, the defense, judges, law enforcement, witnesses, and the judicial system itself with its rules, procedures, etc. By intention or accident, each increases the pressures that favor continuances.

The Prosecution. In a criminal situation, the state is generally the prosecution. Like any bureaucracy, the state has many agendas. What rises to the top, whether through seriousness or newsworthiness, is likely to receive most immediate attention. Despite complications, a John Wayne Gacy is tried with remarkable speed. Other cases wait their turn, or spin off in the revolutions of the system. "The system," said one judge, "needs incentives and motivators for expediting cases."

Continuances can be accidental or deliberate. The state's attorney's office may delay a case it expects to lose until it is no longer in the news, or demand continuance after continuance in hopes of forcing a more favorable plea. According to former Cook County Circuit Judge Louis Garippo, "A judge can force the defendant to trial, but not the state."

Sheer volume is the major cause of state-initiated continuances. Cook County justices agreed that the county's continuance problem is a result of "the massive workload of the state's attorney and his inability to cope with it."

Many believe continuances are more damaging to the prosecution, which bears the burden of proof and is responsible for producing the majority of the witnesses. Faced with a weakening case, the prosecution may be more amenable to reduction of a charge or allowing the case to die altogether.

The Defense. The U.S. Constitution states that, "In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . .," but defense delays may originate in the client, his counsel or the law.

The criminal defendant in Illinois, by statute, is entitled to the advice of counsel before pleading to the charge. If at arraignment the defendant has been unable to secure counsel, the court is required to order a continuance to enable the defendant to do so.

Illinois statutes permit a variety of pre-trial motions which in themselves create delays. These motions include dismissals, bills of particulars or a list of witnesses, substitution of judge or counsel, and suppression of confessions or illegally seized evidence. The granting of most pre-trial motions is at the discretion of the trial judge. The statutes remain silent as to the time that may be expended on these issues.

'The massive workload of the state's attorney and his inability to cope with it' is the main cause of state-initiated continuances

The criminal bar, as opposed to the civil bar, is comprised of a very small number of attorneys. Many continuances, says Henry E. Scheffler, chief of the Criminal Division of the Cook County Public Defender's Office, are simply side effects of overcrowded schedules. Lawyers in private practice can be selective in choosing which and how many cases to accept. Public defenders, however, must accept and [illegible] all cases referred by the courts. [illegible] sectors are hard pressed to handle Cook County's thousands of felonies.

Defense attorneys, once secured, may believe it is a sacred duty to attempt every means available to preserve their clients' innocence, prolong their freedom or forestall the inevitable verdict. Some attorneys fight for dismissal past the eleventh hour. Procedures are necessary to support justice, but they also delay trials. There may be motions for dismissal or suppression of evidence and requests for more time to prepare complex cases with multiple defendants, to find missing witnesses, to allow psychiatric examination or presentencing investigations. Said a prominent Cook County defense attorney who asked to go unnamed, "In a criminal trial, being dilatory is a right."

"And *all* right when being dilatory relates to fee and timeliness," added a colleague. Not infrequently, motions are offered as part of the good show necessary to justify high fees. When a client is jailed while awaiting trial, recurring continuances may be a reminder that attorney's fees are customarily paid before services are rendered.

Continuances agreed upon by prosecution and defense are another source of delay. If neither side feels ready to go to trial, they may agree to stop the speedy trial clock in order to gain time to prepare. Cook County Circuit Judge Benjamin S. Mackoff speculated that "judges might be less likely to agree to continuance requests if they were not so often 'double blackmailed' by defenders and prosecutors who have already agreed among themselves to delay." These continuances in turn increase the likelihood of bargained pleas.

Judges. Many of the same problems that cause continuance requests from the bar also favor continuance granting from the bench. Judges also suffer from overcrowded schedules and demanding responsibilities. Overloads result in unmanageable dockets. Federal Appellate Judge William J. Bauer spoke freely about a problem other judges recognized off the record: "The caseload should be weeded out." A judge unable to determine how many scheduled cases will proceed cannot know if he will encounter dead time. According to Chief Justice of the Criminal Division of the Cook County Circuit Court, Judge Richard Fitzgerald, "Each judge must be allowed flexibility to manage his own time and courtroom proceedings." Until judges become managers, overcrowded schedules and lengthy delays will remain the order of business.

The problem is compounded by informal codes of conduct and the prevalence of gentlemanly agreements.

Court rules are utilized as little more than guidelines for trial court discretion. Oral, off-the-record requests and easy compliance are normal on both sides. "Accountability demands that all motions for continuance, indeed all motions in general, should be made part of the court record," said former Judge Garippo. "In that way we would have less abuse of the informal system."

The pressures of time, the custom of relaxed rules and human nature all can be factors in judicial dilatoriness.

Law Enforcement. The problem of delay is compounded by issues affecting other participants in the justice system. The business of police departments, says James O'Grady, undersheriff of Cook County and past superintendent of the Chicago Police Department, is to keep law and order. Time off the streets is charged to the public in reduced service and protection. If court appearances are scheduled on off-duty or overtime hours, as they are in 60 to 70 percent of all cases, according to O'Grady, the cost to the employing department or agency can be tremendous.

The human costs of continuances are also considerable. Law enforcement officers expend a great deal of time in preparation of cases for presentation to the prosecutor. In many cases, surveillance and evidence must be maintained, witness and victim interviews completed and verified, and endless routine chores kept up to date. After all this work, "nothing is more frustrating to an officer than losing a conviction because a case was repeatedly delayed," says Eldon L. Quick of the Illinois Chiefs of Police Association.

Repeated continuances are a common source of ill-will among the court, the attorneys on both sides and the law enforcement officers. "Cooperation and recognition of one part of the system by all other parts is a prerequisite in any system. Each part is equally important to the effectiveness of that system," said Richard Napoli, director of Adult Probation of the Cook County Probation System.

Witnesses. The backbone of many cases is the testimony of witnesses. Repeated delays discourage witnesses from appearing. Many become less cooperative and often refuse to appear. Most witnesses cannot afford time away from their work and the related loss of wages. The time and expense involved in traveling to and from court, especially in such a congested system as Cook County, which covers over 250 square miles, is an added hardship on those who must appear. In addition, delays dull both memory and fervor. All these factors can have substantial impact on the trial testimony of witnesses. In a high percentage of cases, acquittal can be attributed to the loss of testimony by a witness. Said one assistant state's attorney who had seen case after case falter after long delays: "The victim and the public are one and the same. Their rights should be recognized."

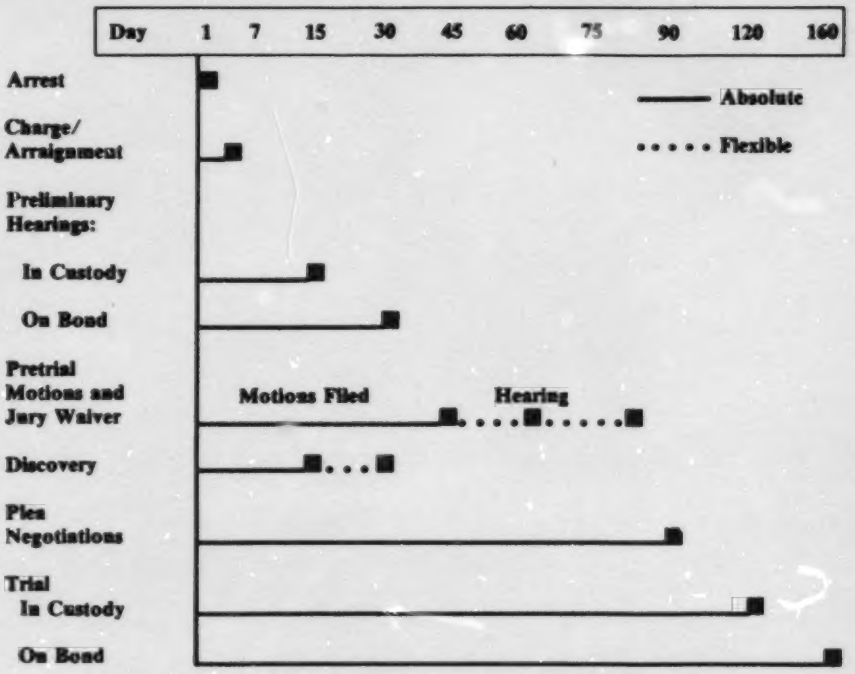
The Judicial System. In Cook County — with 45 percent of the state's population and a single judicial circuit — Illinois' continuance problem reaches its boiling point. The widely spread court system is a further complication, making it difficult for all parties engaged in a trial to be in the same place at the same time. Overloading, overcrowding, distance, the number of court locations, traffic and even weather make continuance by accident as common as continuance by intention.

Finally, despite the best intentions of most elements involved in a case, the philosophical objective of a speedy trial act may be compromised or defeated. Expeditious trials are intended to protect defendants from prolonged and lengthy prosecutions. Such delay is extremely costly for an incarcerated defendant awaiting trial. For those defendants not incarcerated, a delay may be more desirable and outweigh the involved costs. Nonetheless, in order to maintain public confidence that the guilty are punished, swiftness is crucial.

Guidelines and penalties

To resolve the problem of delayed justice, the federal government, some states and a number of organizations that watch over the business of justice have suggested or instituted a variety of standards. Texas presently employs a caseload management system. In order to permit prosecutors, defense attorneys, law enforcement officials and court personnel to accomplish their goals simultaneously, that state is building an information system and clearinghouse. Texas also offers seminars to judicial officers in planning,

Parameters commonly recommended* for speedy trials



**American Bar Association, National Association of Courts and other similar associations across the nation generally recommend these time guidelines.*

human relations, monitoring and change. The federal government, the American Bar Association, the National Association of Courts and the states of Iowa, Florida, New York, South Dakota and Wisconsin have all created specific standards and recommendations for time limitations on arrest and trial. Furthermore, these five states have proposed or recommended specific penalties for violation of those standards. These include fines, contempt citations, disqualifications, grievance procedures, reduced fees paid to attorneys from public funds and noncompliance notices to prosecutors.

Within the federal courts, which are regulated by the Federal Speedy Trial Act of 1975 (18 USC 3162), indictments must be filed within 30 days of the arrest or summons. Arraignment must take place within 10 days of the indictment, with trial commencing no later than 60 days from that point. Parameters have also been established to control other delays. Continuances are allowed when it is necessary to establish the mental competency of the defendant, when the defendant is on trial on other charges, when interlocutory appeals or hearings on pre-trial motions are necessary, or when the defendant or an essential witness is absent or unavailable. Continuances may be granted only if the court sets forth, for the record, either orally or in writing, its reasons for the delay. Reasons for the findings must show that granting the continuance best serves justice and the interests of the public and the defendant.

The Federal Speedy Trial Act also establishes guidelines to which judges must adhere when considering continuances. If failure to grant a delay would make continuation of the proceedings impossible; if allowed preparation time under the limitations would be unreasonable due to the complexity or unusual nature of the case; or if the grand jury has delayed in making its indictment, continuances are in order.

The federal act specifically mandates that no continuance shall be granted as a result of congestion of the court calendar or failure to prepare by the attorney for the government.

The federal law also calls for charges to be dismissed when no indictment or information has been filed within the required time limit. In dismissing charges, the court must consider the seriousness of the charge, the circumstances which led to the dismissal and the ramifications of reprosecution.

Sanctions may be imposed upon both counsel for the defense and the attorney for the government when they allow a case to be set for trial with the knowledge that a necessary witness will be unavailable; file a motion without merit for the sole purpose of delay; attempt to obtain a continuance through false statements; or fail to proceed to trial without justification.

Penalties for violations of the standards include reduction in fees for defense counsels and fines for prosecutors; denial to practice before the court for prosecutors; and reporting to the appropriate disciplinary committees.

The federal act mandates that no continuance shall be granted as a result of congestion of the court calendar or an ill-prepared government attorney

The federal Speedy Trial Act has been gradually phased into practice, with sanctions effective July 1, 1979. This phase-in has allowed the federal court system to adjust and conform to these mandates. The federal act has furthered the timely disposition of cases largely because of these sanctions.

While the federal Speedy Trial Act has proven beneficial, it is not applicable wholesale to state justice systems. Many aspects would be difficult to apply to state court systems because of the differences in cases prosecuted under state and federal law. But the federal act has amply demonstrated that speedy justice is possible. For those who would reap similar benefits for Illinois, three considerations are paramount in revising law and practice. These are sanction, controls and phasein.

Sanctions force the parties to justice to become more effective because they have no alternative. Dismissal of all charges binding an accused felon who has not received timely justice is the ultimate sanction. Advocates, such as the American Association and the National Association of Courts, believe states should adopt specific penalties for violation of standards similar to the federal sanctions. Five states have adopted penalties for violations, and they report they have been effective in the speeding up of the trial clock.

Implementation of a "master calendar" approach to justice in Cook County, utilizing administrative controls and time limitations to coordinate trial procedures, must begin with education. But education of those involved in the administration of justice in the goals of such revolutionary changes cannot alone bring efficiency. Real change also demands rebudgeting and such innovations as hiring law clerks to assist circuit court justices.

Finally, an efficient system of justice depends on realistic timetables for implementation. Phasein of the federal Speedy Trial Act took four years. Because the present Illinois system is geared to delay, abrupt changeover to both time limitations and sanctions could result in chaotic problems worse than delay.

The court system does not work as an exact science. Room must be left for judgment and discretion on the part of prosecutors, defense attorneys and the judiciary. The abuse of the continuance motion in the felony courts of Cook County, however, oversteps discretionary boundaries. Unnecessary court delays defeat the ultimate purpose of the justice system. As matters stand now, the Illinois Speedy Trial Act is being compromised. Without action, its entire purpose may be defeated.

Each part of the criminal justice system has duties and rights, responsibilities and authority. Preserving those rights while protecting citizens' rights to an effective, efficient and fair system for the administration of justice is the issue at hand.

Justice and education

In his last annual address before the American Bar Association, Chief Justice Warren E. Burger outlined a proposal for reforming the process by which justice is delivered. "Lawyers, lawmakers, and the judiciary must work together to remedy the deficiencies that exist in dealing with the prob-

lems of crime and criminals," he said. In reducing crime, Justice Burger believes, the paramount issues are "the deterrent effect of swift arrest, speedy and prompt trial, certain penalty, and at some point finality of judgment."

At the state level, reform may only come through action in the General Assembly. Rep. Roman J. Kosinski (D., Chicago) with the backing of then-Director of the Illinois Department of Law Enforcement Tyrone C. Fahner, petitioned a subcommittee of the Judiciary II Committee to hold hearings on the matter of felony trial continuance and delay problems. Hearings were held last summer.

In April, Rep. Kosinski introduced House Bill 1390 to remedy the problem. He said, "My underlying concern is proper state prosecution in felony trials. Loss of state witnesses is too often due to an excessive number of continuances. Whether as a defense ploy, full court agendas or lack of

The paramount issues in reducing crimes are '. . . swift arrest, speedy and prompt trial . . . and at some point finality of judgment'

defense time, the end result is the same. Mr. Citizen witness becomes disenchanted or economically oppressed and falls away from the trial."

Fahner, now attorney general, has indicated he intends to testify as a proponent of H.B. 1390. He said he supports the general thrust of the bill.

Leaders in the federal and state criminal justice systems have reopened some painful wounds by laying the blame for justice delayed and denied exactly where it belongs — on the practitioners in the system.□

Marilyn J. Rice has a master's degree in legal studies, Sangamon State University, and has 10 years experience in state government with emphasis in law enforcement and corrections. She is now executive assistant to the director of the Department of Corrections Training Academy.

Illinois Issues

Sangamon State University
Springfield, Illinois 62708/217/786-6084

Dear Reader:

If you have found merit in the articles collected here in Current Illinois Legal Issues, you may wish to subscribe to the magazine where they originally appeared: Illinois Issues, published by Sangamon State University and cosponsored by the University of Illinois. Established in 1975, Illinois Issues has followed state legal issues closely since that time. In addition, the magazine regularly summarizes important court and attorney general opinions and follows the actions of the General Assembly and the governor.

For further information, contact:

Elizabeth Curl
Circulation Director
Illinois Issues
Sangamon State University
Springfield, Illinois 62708
217/786-6084

Reprinted from *Illinois Issues*, November 1978

By DAVID F. SCHWARTZ

Can it pass muster?

Analyzing Class X under the U.S. and Illinois constitutions

AFTER intense political wrangling between the governor and legislature (see October and December 1977), House Bill 1500, usually referred to as Class X, became effective February 1. Debate has focused on whether Class X is an effective and appropriate response to violent crime, a debate that cannot be resolved with certainty for years. However, long before its effectiveness can be calculated, Class X will undoubtedly undergo intense constitutional scrutiny in both state and federal courts. Unless Class X can pass muster under both the Illinois and U.S. constitutions, any success it achieves in reducing violent crime may only be temporary.

Class X makes several significant changes in the Illinois criminal justice system, the most prominent of which is the creation of a new category of felony offenses. Such crimes as kidnapping, rape and sexual assault, armed robbery or armed violence, treason, and manufacture or sale of narcotics have been designated Class X felonies (murder retains a separate felony designation), and the prison sentences for these offenses have been significantly increased.

But the most significant change is the abolition of both indeterminate sentencing and parole. Illinois felons will now be sentenced to a specific number of years in prison, and they will serve the entire term less only specifically calculated time for good behavior.

In addition, Class X doubles the normal prison sentence for repeat offenders (those twice convicted of the same Class X felony) and for "heinous" offenders (those whose crime is "accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty"). Habitual criminals (those convicted of three Class X felonies) receive mandatory life sentences.

Equal protection

To a large extent, Class X remedies some major constitutional problems related to gross disparities in sentencing for similar crimes. Thus far, the U.S. Supreme Court has confronted this problem only with regard to the death penalty. However, there has been a growing recognition that the federal constitutional command of equal protection of the laws requires that defendants who are similarly situated with regard to their backgrounds and crimes should be treated roughly the same; and in *Furman* v. *Ga.*, (1972), the U.S. Supreme Court struck down a sentence simply because there were no criteria to insure that similar cases would receive similar treatment. Class X addresses this concern by enumerating aggravating and mitigating circumstances that the sentencing judge must consider, requiring written specification of why a particular sentence was imposed, and giving formal legal recognition to the practice of appellate review and modification of disproportionate sentences. While the penalty for a Class X conviction ranges from 6-30 years, the sentencing judge no longer has anything like unbridled discretion in choosing a figure.

The most pronounced feature of Class X is its general philosophy of greatly increasing punishment for violent criminals. In the past decade, federal courts have begun to examine the permissible scope of punishment under the Eighth and Fourteenth amendments to the federal constitution, both of which prohibit state and federal governments from inflicting cruel and unusual punishment. In *Gregg* v. *Ga.* (1976), the Supreme Court decided that a punishment is cruel and unusual if it: 1) purposefully inflicts pain and suffering; or 2) is grossly disproportionate to the crime for which it is imposed; or 3) has been generally rejected by enlightened society. The question is: How does Class X stack up under these criteria?

One would be hard pressed to argue that a sentence of up to 30 years for rape, armed robbery or treason is either grossly disproportionate to those crimes or out of step with what enlightened society considers proper. It is important to note that the second and third *Gregg* criteria neither ban severe punishment

DAVID F. SCHWARTZ
Assistant professor of government and public affairs, Southern Illinois University at Edwardsville, he holds the B.A., M.A., and Ph.D.

nor require that a state adopt the lowest common denominator.

Similarly, both the abolition of parole and the adoption of determinate sentencing seem immune to federal challenge. Parole is a legislatively granted privilege rather than a federal constitutional right so that its total absence cannot logically raise a federal issue. Determinate sentencing actually removes the equal protection problems noted in *Furman* by placing in the sentencing judge the power and responsibility to insure that both sentencing and time served are uniform.

Due process

The major federal constitutional problems which are raised by Class X stem from the heinous offender-habitual criminal provisions. It is clearly neither disproportionate nor atypical of national practice to substantially increase penalties for multiple offenders or to recognize that the manner in which a crime is committed is a rational factor in assessing punishment. However, the statute's definition of heinous behavior ("indicative of wanton cruelty") is so vague that one who is adjudged a heinous offender might well be denied liberty without due process of law in violation of the Fourteenth Amendment. At minimum, due process means that a person of common intelligence must be able to understand what conduct is prohibited by a criminal law. This is not to say that a criminal's cruelty may not justify greater punishment; it does, however, suggest that the legislature must specify what conduct indicates wanton cruelty instead of leaving such a determination to the unbridled discretion of a judge or jury.

The mandatory life sentence for habitual criminals seems to contradict recent federal court decisions. Prior criminal activity is surely a legitimate factor in assessing punishment. However, in two decisions (again both dealing with the death penalty), the U.S. Supreme Court ruled mandatory sentencing laws unconstitutional. In *Woodson* v. *N.C.* (1976) and *Roberts* v. *La.* (1977), the court held that a state could not impose mandatory sentences for first degree murder or for the murder of a peace officer, respectively. Neither decision meant that the death penalty could not be imposed but only that the failure to consider mitigating circumstances was cruel and unusual. The court argued that, regardless of the crime, mitigating circumstances could always exist. To the extent they exist, such circumstances must be considered and alternative punishments must be available. In *Carmona* v. *Ward* (1977), a federal district court used this logic to invalidate the mandatory life sentence that was the cornerstone of New York's tough narcotics law. The precedents seem to indicate that while Illinois can make a life sentence a possibility for the habitual criminal, it may not make such a sentence automatic. Moreover, the precedents seem to suggest that the legislature will have to specify mitigating circumstances.

While the federal constitutional analysis of Class X must focus on a rather vague, 187-year-old cruel and unusual punishment provision, the current Illinois Constitution, adopted in 1970, provides the Illinois courts with a more contemporary and seemingly more specific standard. Article I, section 11 requires that "penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Illinois courts have consistently interpreted section 11 to require the sentencing judge to balance the "retributive and rehabilitative purposes of punishment." As long as the judge does not "resign to total retribution one who has a chance of future restoration to useful citizenship," he has probably satisfied section 11 (*People* v. *Gibbs*, 1974). On this basis, appellate courts have often reduced lengthy sentences that were not sufficiently cognizant of rehabilitative potential.

> Class X needs more flexibility in providing for the habitual criminal and more precision in defining 'heinous' crime. But its key provisions are clearly constitutional

Class X gives the sentencing judge considerable latitude in deciding on punishment. However, in keeping with section 11, Class X lists specific factors that mitigate the crime (indicating the potential for rehabilitation) and factors that aggravate the crime (indicating the degree of retribution). Like the Eighth Amendment, section 11 does not prohibit the imposition of severe punishments as long as the sentence "fits the crime" and the criminal. Clearly, this is not an area of human endeavor susceptible to mathematical precision, and people will differ over whether the balance in a particular case has been correctly drawn. Section 11 requires only that a reasonable attempt is made to strike a balance, and Class X seems to conform to that requirement.

Rehabilitation

Nothing in the Illinois Constitution affects the legislature's decision to abolish parole and indeterminate sentencing. However, section 11's concern with rehabilitation seems to bar the mandatory life sentence for habitual criminals. While the commission of three Class X felonies might indicate a minimal chance for rehabilitation, section 11 mandates that assessing the chance is the function of the trial judge acting on a case by case basis.

Whether Class X really stems the tide of violent crime and whether its passage was worth the tremendous amount of political infighting that preceded it remains to be seen. While the legislature will probably have to write some flexibility into the habitual criminal provision and more precisely define a "heinous" crime, the key provisions of Class X seem clearly constitutional. It is perhaps paradoxical that the "law and order" sentiment that motivated Class X — a sentiment usually associated with political conservatism — arguably makes the Illinois Criminal Code more consistent with federal and state safeguards of the rights of criminal defendants — a tendency usually associated with political liberalism. While one could argue with some justification that lengthier sentences and unrelieved confinement are hardly liberal goals, Class X attacks those capricious sentences and arbitrary paroles which the Supreme Court rejected in *Furman*. No one yet knows with certainty how to accomplish the "restoration to useful citizenship" that section 11 of the Illinois Constitution mandates. However, Class X seems to make retribution more systematic, more appropriate to the offense and hence, more just.□

Reprinted from *Illinois Issues*, October 1981

By JAMES K. ZERKLE

An inequity in sentencing law

EARLY RELEASE credit for good behavior is an integral part of all prison sentences imposed in Illinois, but there is a contradiction in this stautory good time credit scheme.

The general policy of allowing good time credit encourages an offender's good behavior and assists the Department of Corrections in the maintenance of discipline in the correctional system. The Illinois sentencing scheme provides for early release opportunities for persons convicted of both felonies and misdemeanors (*Ill. Rev. Stat.*, 1979, Ch. 38, sec. 1003-6-3 and Ch. 75, sec. 30 *et seq.*). Through an apparent oversight in the law, however, a person convicted of a misdemeanor receives less good time credit than a person convicted of a felony.

The Class X sentencing provisions which became effective February 1, 1978, provide that all persons serving a sentence for a felony offense receive a reduction of one day from their prison term for each day of good behavior in the correctional institution, hence the phrase "day for day good time credit." The Misdemeanant Good Behavior Allowance Act was passed by the General Assembly in 1957 and amended to its present form in 1959. Department of Corrections Administrative Regulations Nos. 859 and 866 provide that misdemeanants receive both statutory and compensatory good time allowances. Administrative Rule 859 implements the act. Under AR 859 misdemeanants receive statutory good time credit at the rate of six days reduction of sentence per each month of good behavior beginning at the second month until the sixth month. At the seventh month, the credit rate becomes eight days per month. In addition, under AR 866 misdemeanants may earn up to seven-and-one-half days per month in compensatory good time credit.

However, in changing the good time credit allowance to day for day credit for felonies through passage of the Class X legislation, the General Assembly failed to amend the existing good time credit allowance for misdemeanants. In practice, this means that an offender serving a one-year determinate term of imprisonment for a conviction on a Class IV felony (e.g., deceptive practices by check over $150) is released approximately seven weeks earlier than a person convicted of a Class A misdemeanor (e.g., deceptive practices by check under $150) and sentenced to the maximum 364-day term. Consequently, in some instances, the offender serving a sentence for a misdemeanor conviction serves a longer period of imprisonment than an offender serving a sentence on a felony.

The Illinois Constitution requires that "all penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship" (Art. I, sec. 11). In following the Illinois constitutional mandate, the General Assembly set forth the purposes of the Unified Code of Corrections:

> *The purposes of this Code of Corrections are to: (a) prescribe sanctions proportionate to the seriousness of the offenses and permit the recognition of differences in rehabilitation possibilities among individual offenders; (b) forbid and prevent the commission of offenses; (c) prevent arbitrary or oppressive treatment of persons adjudicated offenders or deliquents; and (d) restore offenders to useful citizenship.* Ill. Rev. Stat., *1979, Ch. 38, sec. 1001-1-2.*

The purposes of the statute are not satisfied under the current good time credit scheme. It is apparent that granting greater good time credit to persons convicted of felonies than for offenders convicted of misdemeanors does not allow for proportionate sanctions, nor does it prevent arbitrary or oppressive treatment of persons adjudicated as offenders where lesser offenses are punished more severely. Finally, the present credit scheme does not encourage persons convicted of misdemeanors to useful citizenship where in some cases, persons convicted of felonies are allowed earlier release.

This good time credit imbalance has been challenged in the courts, and several criminal appeals involving this inequity are presently pending before the Illinois Appellate Court. Although no decision has been reached, several courts have addressed similar issues in other cases. For example, in *People* v. *Bradley*, 79 Ill.2d 410, 403 N.E.2d 1029 (1980), the Illinois Supreme Court held that a defendant's due process rights were violated by a sentencing scheme which provided a greater sentence for possession of a controlled substance than it did for delivery of the substance. The court noted that the greater sentence for the lesser offense could not have been intended by the legislature and violated the purposes set forth in the Controlled Substance Act. Further, in *Bowing* v. *Manson*, 345 F. Supp. 48 (D.C. Conn., 1972) the federal court held unconstitutional a good time credit scheme as applied to the residents of Connecticut correctional institutions. The decision turned on whether there were any substantial differences in treatment or conditions of incarceration which would justify inconsistent good time credit allowances. The court stated:

> *Since, therefore, the State has made no distinctions in the conditions of confinement based on the nature of an inmate's sentence, there is no basis in fact, much less a compelling State interest in different treatment methods, behind the challenged discrepancy in good time. 345 F. Supp. at 51.*

In Illinois, a person convicted of a

James K. Zerkle, assistant corporation counsel for the City of Springfield, was an assistant defender with the Office of the State Appellate Defender from 1979 to 1981.

misdemeanor and sentenced to the Department of Corrections is subject to the same rules and regulations as all other residents committed to the department, except that person does not receive the same day for day credit as those being held on felony convictions.

In summary, there are compelling public policy reasons for amending the existing statutory credit scheme. Substantial numbers of persons are serving terms of incarceration in the Department of Corrections for misdemeanor convictions. Allowing those offenders to earn credit on a day for day rate would enable the Department to release them earlier, thus assisting in solving the chronic problem of overcrowding. Certainly, earlier release of misdemeanants through day for day credit is preferable to the early release of felony offenders in periodic special release programs implemented by the department because of overcrowding. Further, if the General Assembly changes the law, numerous court challenges by persons presently incarcerated on misdemeanor offenses may be avoided. Finally, the statutory good time credit scheme, which provides more credit to convicted felons for good behavior than for offenders with misdemeanor convictions, does not serve the legitimate public policy purposes set out by the Uniform Code of Corrections and should be amended by the General Assembly. A change in the law, which would allow misdemeanants to earn day for day credit, is consistent with the constitutional requirement that the punishment fit the offense.□

EDITORS' NOTE: By statute, persons convicted of misdemeanors still receive less good time credit. An appellate court in People v. Burton, *100 Ill. App. 3d 1021, 427 N.E.2d 625 (1980), upheld the difference in good time provisions. The court reasoned that the legislature can handle felonies differently because felonies are a distinct class of crimes, and because of the seriousness of a felon's crime and the subsequent need to provide incentives for convicted felons to conform to prison rules.*

Illinois Issues

Sangamon State University
Springfield, Illinois 62708/217/786-6084

Dear Reader:

If you have found merit in the articles collected here in Current Illinois Legal Issues, you may wish to subscribe to the magazine where they originally appeared: Illinois Issues, published by Sangamon State University and cosponsored by the University of Illinois. Established in 1975, Illinois Issues has followed state legal issues closely since that time. In addition, the magazine regularly summarizes important court and attorney general opinions and follows the actions of the General Assembly and the governor.

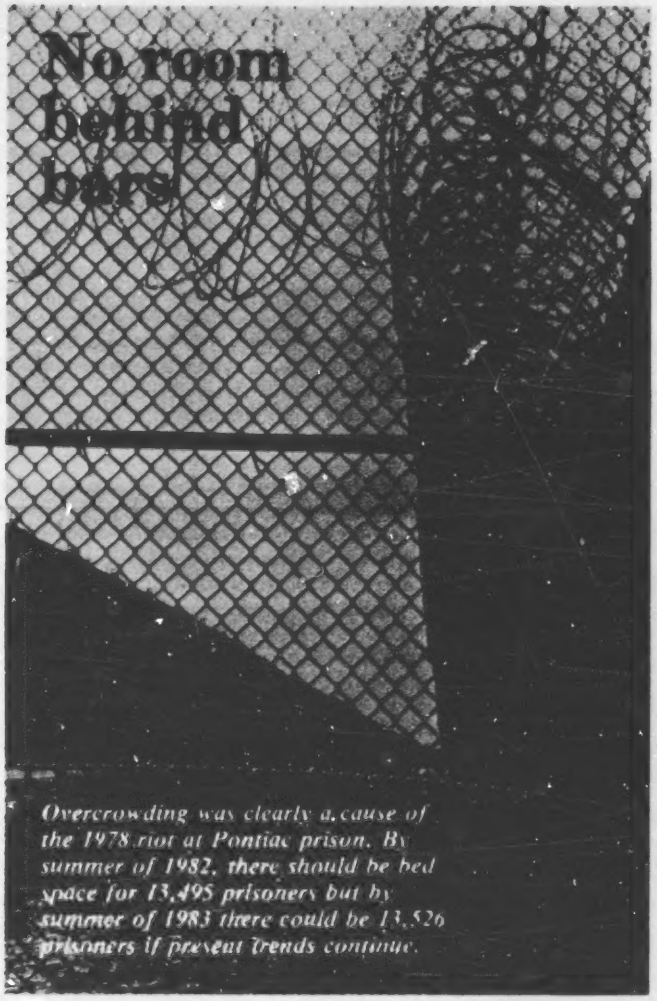
For further information, contact:

Elizabeth Curl
Circulation Director
Illinois Issues
Sangamon State University
Springfield, Illinois 62708
217/786-6084

Reprinted from *Illinois Issues*, May 1980.

By JOHN F. BOYLE

No room behind bars



Overcrowding was clearly a cause of the 1978 riot at Pontiac prison. By summer of 1982, there should be bed space for 13,495 prisoners but by summer of 1983 there could be 13,526 prisoners if present trends continue.

Stateville at Joliet

Vienna Correctional Center

GAYLE FRANZEN is worried. As director of the Illinois Department of Corrections (DOC), he is aware that overcrowding was an important (if not the chief) cause of the 1978 riot at Pontiac prison where three guards lost their lives. He has cited overcrowding as an indirect cause of the September uprising at Stateville prison.

Right now, prison population is very close to capacity, and the population at the state's prisons is currently increasing by 14.3 inmates per week, according to DOC estimates. The maximum capacity of the prison system, as of December 31, 1979, was 11,395, and the population then was 11,211. But can the 2,100 beds in new prison facilities now under construction accommodate the projected prison population? In the short run, there should be enough beds. By the summer of 1982, with all new facilities open, there will be 13,495 beds and an estimated prison population of 12,783. But by the summer of 1983, if trends continue, there will be an estimated 13,526 prison population, which is just over capacity.

The December decision by the Illinois Supreme Court on the applicability of the new "good time" provision under Class X legislation resulted in the early release of about 400 prisoners. The early release of those prisoners should give the overloaded prison system a crucial six-month breather. But Franzen clearly has cause for concern as he tries to increase capacity to keep ahead of increasing prison population.

Franzen knew when he accepted the job in February of 1979 that it would not be easy. He was extremely critical of the department's past operations and announced that his top priority would be to solve the overcrowding and understaffing at Illinois' four maximum-security prisons. During the Thompson administration, the General Assembly approved legislation to build two new medium-security prisons. Each has a capacity of 750 persons and are scheduled to open this year in Centralia and Hillsboro. The General Assembly also appropriated the funds to convert the mental health facility at East Moline into a minimum-security institution with 200 beds. It is scheduled to be opened in 1981.

The most innovative approach to increasing the capacity in the prison system is the work camp. Three camps are scheduled to be open by June 30 with a

total capacity of 150 prisoners.

The work camp idea is this: low-security offenders who have committed nonserious crimes and are near the end of their sentences would do menial labor on roads in sparsely populated areas. This work would save tax dollars and free up prison space. Those assigned to work camps would live in low-cost, temporary facilities near work areas. The General Assembly has already passed work camp legislation which allows such activities; but Laurel Rans, DOC deputy director for policy development, would like approval for prisoners to work in recreation areas. "I don't think the workers should be restricted to roadwork and other Department of Transportation projects," Rans said. "We have lots of parks and forest preserves that need trailwork done each year during early spring and late fall. We could beautify our public lands and at the same time take these men away from maximum-security prisons — where they don't belong."

Problem of mix

Franzen is aware of the fact that too many nonserious offenders are placed in maximum-security prisons, but he's been hard-put to do anything about it. "Three-fourths of all space in the state prison system is in maximum-security prisons," he said, "so we consequently have a problem involving segregation of prisoners according to their offense. We have people convicted of driving while intoxicated who are in maximum-security facilities. At this time there is simply nowhere else to put them."

Franzen and Rans would like to see nonserious offenders sent to work camps. "Maybe people won't holler about their tax dollars when they see something like work camps," he said. One of the principal advantages of work camps is that housing facilities for them can be set up in much less time than it takes to build a prison. More minimum-security work camps could be ready by next summer if the General Assembly grants the appropriations. DOC is requesting funds to open more work camps if needed so the system could have a total of seven or eight work camps operating by June of 1981. Each would house 50 persons, thus putting the total capacity for the work camps at 350-400 beds.

The 700 new beds from Centralia and Hillsboro, the 200 new beds at East Moline, plus 400 from the work camps, would give the system 2,100 new beds by June 1982. When these 2,100 new beds become available, the present shortage will be met. Meanwhile, the question remains: What will happen when the system's burgeoning population outgrows its increased total capacity? The state is not presently planning any other new correctional facilities, and even if it were, such facilities might not be completed in time to handle projected increases. It takes three to five years to build a medium or maximum-security prison, about two years for a minimum-security prison, and almost a year to convert a mental health facility like Logan.

The department has considered a variety of alternatives to deal with overcrowding, but none of them will eliminate the crunch that is due to occur in the mid-1980's. One proposal would reduce the rate of admission to state prisons. The drawback here, of course, is that the department has no control over admissions. Franzen gives four reasons for the growing prison population: improved law enforcement, speedier handling of cases by the courts, stiffer penalties for offenses, and high unemployment. As long as Illinois continues to use the same criteria for sentencing offenders, the four factors Franzen cites will insure a steady or increasing flow of new inmates into the Illinois prison system.

Another way to control overcrowding in the prisons is to reduce the length of stay; but again, Franzen's department has little input here. The recently implemented Class X offenses with determinate sentencing call for mandatory minimum sentences, usually between six and 30 years.

Trends from Class X

"We don't have any actual statistics yet to prove that Class X has kept more people in our prisons," said Mike Mahoney, executive director of the Chicago-based John Howard Association, the state's foremost prison "watchdog" group. "But the Criminal Sentencing Commission is coming out with a report in three to six months that should show it has. Right now, all we can do is look at individual cases and talk to specific authorities, but all indications point to an increase caused by Class X."

Another way of handling the expected overcrowding would be to jam more people into whatever available space is left. It is a solution that Franzen finds totally unacceptable. "Triple-celling is absolutely out," he said. Triple-celling would put three prisoners in a 5 by 8½ foot cell.

Illinois' prisons really can't take many more people under any circumstances, according to Rans. "We've overcrowded ourselves almost to the point where it would be impossible to bring more prisoners into our existing facilities," she said. "We like to talk about the rate of capacity of each institution, but that's really only a relative term; we've inflated our real rates of capacity again and again.

"For example, an institution might have an ideal rated capacity of 600 persons. But we have to raise it higher and higher until we raise it to, say 1,000. We can get by with that many prisoners, but we're seriously overcrowded. And right now, we're approaching the end of our line. We've determined that the maximum possible rate of capacity for the entire system is about 11,395. That's really hitting tops."

The department arrived at this figure after conducting an exhaustive examination of its current facilities. The study included an institution-by-institution cell count. "The count helped us get a sense not only of our number of

'Three-fourths of all space in the state prison system is in maximum-security prisons, so we consequently have a problem involving segregation of prisoners according to their offense'

cells," Rans said, "but also the number of people in each cell, our capacity of minimum, medium and maximum-security space, and a plan for each of our institutions."

Plans for expansion

The last, and best, alternative is to expand the number of beds in the system. But Franzen said he has no large-scale expansion plan; he said he is just trying to keep the atmosphere in the prisons "under control." Franzen has been stepping up his efforts to alert the public and the legislature to the severity of the problem. He knows the Illinois prison system will need new facilities in the long run. Right now he and Rans are counting on work camps to alleviate overcrowding.

However, if more minimum-security prisons are to be built, planning must begin soon. Rans believes prison population will have increased by at least 1,800 by June of 1982 (which the system could handle), but Franzen is more pessimistic. He said the population may very well be 14,000 by 1982 — a 3,000-person increase (which the system could not handle).

"We think our projection of population increases over the next two years are pretty accurate," Rans said, "but as we move toward 1982, we have less certainty. Given present trends, we know the prison population will continue to go up, but we're not sure by how much. It will probably be at least 15,000 by June of 1985, though. At some point, you have to stop talking about temporary solutions like work camps and start building new institutions. And we'd better start soon, for the medium and maximum-security prisons take a long time to build. So do minimum [security]."

Besides attempting to draw public support for more and better facilities, Franzen has ordered the preparation of a major capital development study to examine the entire Illinois prison system. He hopes the study will show where funds can be best used.

The immediate future for Illinois prisons, while not bright, is at least within acceptable limits where overcrowding and proper segregation are concerned. But, given improved law enforcement, speedy court handling, stiffer penalties, rising unemployment, and the currently unpredictable effect of Class X sentencing on sentence length, the exact prison requirements for the more distant future are hard to foretell. Given the 14.3 inmate per week current increase, by 1983, Illinois could be faced with full to overflowing prisons and no plans for more space on the boards.□

John F. Boyle is a senior in journalism at the University of Illinois, where he will enter the College of Law in the fall.

Illinois' correctional centers

ILLINOIS' 10 major correctional centers, their capacities and populations as of January 24, 1980, are listed below. Total population is 10,958 (287 prisoners were released on January 8 as a result of a court ruling), and total capacity is 11,395. Also listed are new and proposed facilities with their capacities.

Stateville Correctional Center, Joliet. Population: 2,163. Capacity: 2,250. Minimum, minimum with supervision, medium and maximum-security facilities. Opened in 1919 as a maximum-security correctional center.

Joliet Correctional Center, Joliet. Population: 1,260. Capacity: 1,250. Minimum, minimum with supervision, medium and maximum-security facilities. Opened in 1860.

Sheridan Correctional Center, Sheridan. Population: 452. Capacity: 425. Minimum, minimum with supervision, medium and maximum-security facilities. Opened in 1950 as a maximum-security institution for juvenile boys. Switched to current use in August 1973.

Dwight Correctional Center, Dwight. Population: 340. Capacity: 400. Minimum, minimum with supervision, medium and maximum-security facilities. Opened in the early 1930's as a correctional center.

Pontiac Correctional Center, Pontiac. Population: 1,744. Capacity: 2,000. Minimum, minimum with supervision, medium and maximum-security facilities. Opened in 1871 as a boys' reformatory, a juvenile institution.

Vandalia Correctional Center, Vandalia. Population: 709. Capacity: 700. Minimum with supervision and minimum-security facilities. Opened in 1923 as minimum-security institution for misdemeanants and felons.

Menard Correctional Center, Chester. Population: 2,569. Capacity: 2,620. Minimum, minimum with supervision, medium and maximum-security facilities. Opened in 1878.

Menard Psychiatric Correctional Center, Chester. Population: 346. Capacity: 315. Minimum, minimum with supervision, medium and maximum-security facilities. Opened in 1878.

Vienna Correctional Center, Vienna. Population: 647. Capacity: 685. Minimum-security facilities. Opened in October of 1971.

Logan Correctional Center, Lincoln. Population: 728. Capacity: 750. Minimum, minimum with supervision, and medium-security facilities. Originally a mental health facility, it opened in July 1977 as a correctional center.

New facilities

Graham Correctional Center, Hillsboro. Capacity: 750. Medium-security facility under construction. Target date for housing first inmates is August 1980, but completion date is uncertain.

Centralia Correctional Center, Centralia. Capacity: 750. Medium-security facility under construction. Target date for housing first inmates is August 1980, but completion date is uncertain.

East Moline Correctional Center, East Moline. Capacity: 200. A former mental health facility, it is being renovated to become a minimum-security correctional facility. Target date for housing first inmates is January 1981, but completion date for renovation is uncertain.

Work camps at three locations: Sangamon County Fairgrounds near Springfield; Vandalia Work Camp in Fayette County; and Vienna Work Camp in Hardin County. Capacity: 52 per camp, 156 total. Minimum security facilities scheduled to be fully operational by June 1980.

Work camps at other locations. Proposals suggest as many as five more camps if needed with a capacity of 50 at each for a total of 250.

By DIANE ROSS

Reprinted from *Illinois Issues*, August 1982

The chain gang and ERA's bitter end

NEVER had June 30 at the General Assembly meant so much: it was the last day to ratify the Equal Rights Amendment, and the most volatile in recent memory. Never had the public's expectations of what the legislature should do run so far beyond the political realities of what the legislature could do. Never had the Illinois General Assembly so wanted to make an end, so yearned to be done with its constitutional duty to make laws on schedule, so welcomed a deadline.

This year, the economy had reduced the legislature to impotency. The only real issue was the solvency of state government; the only resolution the raising of taxes. And that was impossible in a year in which everyone, from the governor to the legislators to the judges of the circuit courts are on the November ballot. The Illinois General Assembly had no choice: legislators agreed to sit out the spring session without making major new moves on fiscal issues. Without new revenue, legislators could hardly expand services; they would be lucky if they balanced the budget. The only bills with a prayer of passage in 1982 were the ones the Democrats and the Republicans could use against each other in November. With no extra money available this year, though, neither party found anything worth fighting over; few bills promised credit at the polls, many threatened blame.

The mood ran from bitter to belligerent. Thanks to the Cutback Amendment, 59 House seats won't be filled in the 1982 elections. Thanks to reapportionment, and the Democrats' luck of the draw, the Republicans may lose control of the House in the 1982 elections. And thanks to the agreement to sit this session out, the House Rules Committee killed more bills this year than in any previous off year, certainly more Democratic bills.

The ERA was a political issue that had never claimed the priority of either party. The votes simply didn't exist, not to change the rules, not to ratify. Lawmakers knew the ERA was already dead; they saw no reason to go on the record again, especially when the record would put legislators in an unnecessarily awkward position. Besides, lawmakers reasoned, the rest of the nation had no business trying to turn Illinois into a bloody, emotional battlefield. The General Assembly had enough problems; the public had been on its back since lawmakers raised their own pay four years ago. This year, the legislature didn't even bother to observe its traditional rites of spring, a softball game, a legs contest, the impersonation routines. Legislators were not enjoying themselves this year. The session was not a happy one.

Enter the fasters — and the "chain gang," a handful of women from a downstate college town who called themselves the Grassroots Group of Second Class Citizens and who claimed responsibility for 16 acts of nonviolent civil disobedience during four self-styled Days of Rebellion.

It was the chain gang — not the fasters — that electrified the atmosphere in June at the Statehouse. Attitudes toward the protestors shifted form tolerance to tension; nerves were frayed, blood pressures went up. Then legislators literally lost their tempers. It was the sit-in around the speaker's podium — not the splattering of blood on the floors in front of the doors to the House, Senate and Governor's Office — that made legislators mad as hell and determined not to take it any more. It was the disruption of the proceedings of government — not economics, not politics — that in a single day turned this least dramatic of sessions into the most dramatic.

No one had ever dared to confront legislators on their own turf. No one had ever been allowed to walk onto the floor of the House, march down the aisle, sit down in front of the speaker's podium. No one, no one from the outside that is, had ever caused the House to adjourn in chaos — and gotten away with it.

The disruption stunned the House. The chain gang had started chanting the text of the ERA before most members got to their feet. Rep. Pete Peters, a Republican from Chicago who is widely respected on both sides of the aisle, was the first to get the

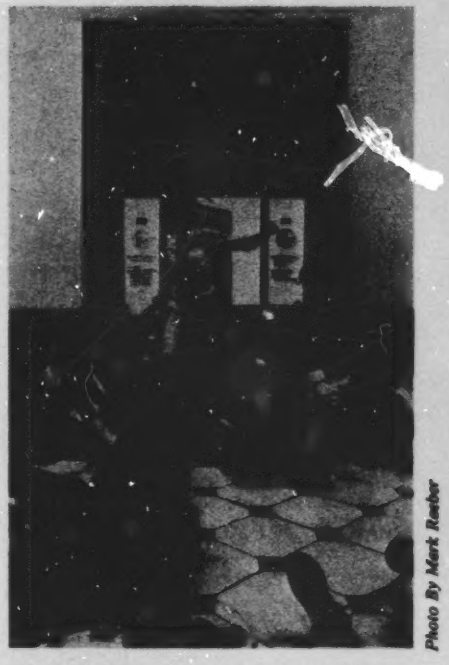


Photo By Mark Rieker

The group of women seated outside the office of House Speaker George Ryan became known as the chain gang during the demonstrations in favor of ratifying the proposed Equal Rights Amendment to the Constitution. In the foreground are news media representatives.

floor; his speech sounded like nothing so much as the late Peter Finch's scene in the movie "Network":

"Mr. Speaker, because the tape [recording of the proceedings] does not indicate what is going on, I would like. . .to indicate that individuals in absolute and total violation of the rules of this House. . .have entered the chamber, are demonstrating on the chamber floor. . . . That is not equal rights. That is not equal dignity before the law. That is not fair. That is not decent. That is not right. That is not all those things that people have been talking about for as long as they have been talking about — the last 10 years — in regard to this Amendment. . . . Mr. Speaker, whenever you are ready, I am ready to put the Motion that we adjourn until July 1."

'Let them sit. Let them scream. Let them yell. Let the state know, let the state know where they are. . . .'

Chaos.

Peters again gets the floor:

"Mr. Speaker, I would ask that the Chair ask the Sergeant-at-Arms not to remove any of the demonstrators, because that is what they are waiting and they are looking for, a confrontation and more screaming and yelling. I. . .I implore you, Mr. Speaker, do nothing, say nothing to these people who are laying here. Let the public of this country, for now and for the next seven and 10 years, make a determination as to exactly what route they want this country to go. Let them make a determination whether those who, for the past 10 years, have been saying 'The proponents of the ERA are wrong.' Let them make the determination they are right. I, in fact, am slowly but surely, making up my mind that perhaps for the last 10 years I have been wrong on this issue. But, Mr. Speaker, let me ask you this. Without touching one hair on the tiny heads of these people here, I ask that you ask the Sergeant-at-Arms to remove everyone from this floor who is not a Member, press, staff and every other person on this floor with the exception of those who are proposing to be proponents of ERA. Let them sit. Let them scream. Let them yell. Let the state know, let the state know where they are. . . ."

Peters was not alone; the public was outraged.

On June 16, the day of the sit-in, five days before the House failed to pass the ERA, eight days before the Senate failed to pass the ERA, ratification of the 27th Amendment to the U.S. Constitution ceased to be the dominant issue before the Illinois General Assembly — at least as far as the legislators' constituents were concerned. Civil disobedience went on trial at the Statehouse in Springfield. At issue was whether the nonviolent actions of the chain gang threatened to incite violence. (The decision for legal action fell under the jurisdiction of the secretary of state.) Public opinion condemned civil disobedience as an intolerable disruption of the proceedings of state government.

The chain gang had, it seemed, failed to "bear witness to women's oppression, to women's anger at this oppression and to women's determination to fight to be free," much less to "signal a new phase of militancy in American feminism," as the women proclaimed in their closing news release.

The ERA may or may not fade away, depending on whether the mainstream of the women's movement can deliver the kind of elective power they promised June 30. Meanwhile, the state resumes its struggle to remain solvent. The Illinois General Assembly is scheduled to reconvene for its fall veto session on November 5, three days after the election. Regardless of who wins or loses, the fiscal state of the state will most likely remain a conundrum.□

By JULIE A. DUTTON

'Scientific creationism' challenges theory of evolution

Reprinted from *Illinois Issues*, February 1981

TEACHER John Scopes, over 50 years ago, faced legal repercussions for espousing evolution as a theory of the origin of life. Today, many schools teach evolution only. But a new movement called "scientific creationism" is challenging the legality of public schools presenting only the theory of evolution in teaching the origins of life.

Evolution theorizes that all life originated from a primitive cell which, through ages of selective pressures and genetic variation, eventually gave rise to complex, diverse life forms. Creationism maintains that a Supreme Being created every life form distinct from all others — apes were always apes, man was always man. Scientific creationism applies laws of biology, physics, and chemistry to the Genesis version of the origin of life. Result: "scientific fact," creationists declare; "pseudoscience," evolutionists scoff.

The issue of interpreting and applying scientific laws has again become a legal dispute. Confident that their theory is scientifically valid, the scientific creationists are demanding equal time in the public school science curricula. They point to academic freedom. Certain that scientific creationism is religious dogma disguised as science, opponents point to the separation of church and state. Legislation mandating a two-model approach to teaching the origins of life has been considered in several states. Such a bill came before the 81st Illinois General Assembly (S.B. 1478, sponsored by Sen. Robert Mitchler, R., Oswego).

Scientific creationists point to the shortcomings in evolution theory. The "missing link" for man's evolution and other gaps in fossil records are conceded by evolutionists as stumbling blocks in their scheme of the gradual development of complex life forms from preexisting simple life forms. Creationists interpret this absence of transitional forms as evidence that there are no connections between species.

The two theories also differ vastly in the age they assign Earth. Creationists peg an age of 10,000 years on the Earth, and deny the radioactive dating and other techniques

used by evolutionists to arrive at an age estimate of 4.5 billion years.

Nor do the creationists adhere to the evolutionists' principle that "ontogeny recapitulates phylogeny," meaning that the embryonic development in several present-day species repeats some of the features found in their supposed ancestoral forms. For example, embryonic mammals form pharyngeal pouches, which in fish (a predecessor of mammals in the evolutionary scheme) later become the gill slits. Creationists cite this similarity in development as superficial, because the pharyngeal pouches never become external openings in mammals.

The two groups also disagree over the second law of thermodynamics. This law states that in a closed system, all things tend toward disorder. Creationists say that by this law, then, life cannot evolve into complex forms, it would regress. Evolutionists stress that the law only applies to "a closed system," which the Earth is not, because it receives continual energy input from the sun. Therefore, evolutionists say, it is invalid to apply the second law of thermodynamics to disprove evolution.

The Institute of Creation Research (ICR), a San Diego-based organization, advocates scientific creationism through promotion and education. Walter Brown, director of the Midwest branch of ICR in Naperville, maintains that those features on Earth which geophysicists cannot explain can be understood in terms of a great worldwide flood, and that there is evidence for the existence of Noah's Ark. Scientific creationists further assert that the requirements for life are too complex for chance alone to account for creation.

Scientific creationism bills have been considered in several other states, including Florida, New York, Georgia and Iowa. The only state to pass such a bill was Tennessee, where its statute mandated that schools teach both theories, but the law was declared unconstituional in 1975 on the grounds that it violated the First Amendment.

In Illinois, Mitchler's bill would have created the "Balance Treatment for Scientific Creationism and Evolution Act," but it was never released from the Senate Rules Committee. That bill would have required that equal time be allotted to scientific creationism and evolution in elementary and secondary public school curricula.

In some instances, creationists are petitioning their local school board for a two-model approach. But the creationists are well aware of the possible legal challenges to their position. The Institute for Creation Research explains the legal implications of promoting scientific creationism in public schools: "Scientific creationism can be taught in public schools, while religious creationism cannot under current law. Creationists approaching public schools must avoid reference in discussions, resolutions, or classroom materials, to the Bible, Adam, the fall, or Noah, except in showing that evolution is wholly contrary to religious convictions of many individuals."

One of the adversaries of scientific creationism is the National Association of Biology Teachers (NABT), whose Fund for Freedom in Science Teaching helped support legal efforts against the Tennessee law. "We vigorously oppose scientific creationism on the grounds that it is not science," said Wayne Moyer, executive director of NABT. Moyer also finds the scientific creationism movement "an alarming trend . . . using all the techniques of propaganda." The NABT, which views scientific creationism as religious dogma, does not oppose presentation of that theory "when it is labeled as a religious position." But Moyer emphasizes, "I don't want science teachers being told they must teach religion."

Brown, who became director of the Midwest Center of the ICR last September, said that in Illinois his organization is "not advocating legislation on a two-model approach, or anything else." While several groups in the state have expressed interest in supporting such legislative efforts, Brown is instead emphasizing public information on scientific creationism. Through such education, he feels people will become convinced of the validity of the theory, and that, in time, the theory of scientific creationism will be incorporated into the school curriculum.

Brown also feels that it is a matter of intellectual maturity; that students should be given the opportunity to scrutinize both evolution and scientific creationism theories before arriving at their own conclusions. His position, says Brown, is simple, "We want *all* the science taught."

The issue begins to resemble the Scopes trial in reverse. And in an interesting twist, Scopes' defense attorney Clarence Darrow said it is bigotry to teach only one theory of origins. □

Support for this column, which reports policy developments concerning science and technology, is provided in part by a National Science Foundation grant to the Illinois Legislative Council Science Unit, where Julie A. Dutton is a research associate.

EDITORS' NOTE: The bill discussed in this article did not pass the Illinois General Assembly. In 1981 Arkansas passed a similar act requiring equal treatment for creation science and evolution in the public schools which was challenged in federal court. In McLean v. Arkansas Board of Education, *529 F.Supp. 1255 (1982), the district court judge struck down the Arkansas act as unconstitutional because it violated the First Amendment's prohibition against establishment of religion as the act was determined to be simply an effort to introduce the Biblical version of creation into the public school curriculum. The case and this issue focus on the basis for creation science and the constitutional issue of separation of church and state. Given the intensity of the issue, it is likely to continue to draw public attention.*

What's in a theory ?

A THEORY is a scientific explanation of a phenomenon based on observation and experimentation. Through research, new observations and conclusions are reported and established. Theories must explain or be consistent with the new information or be adjusted accordingly.

The theory of evolution is not cast in concrete. It must be able to accommodate any new findings coming out of on-going research in diverse scientific fields like geology, paleontology, genetics and embryology.

Evolutionists acknowledge that fossils do not completely record the transition of life from one form to another, but there is sufficient preserved evidence to suggest a phylogenetic scheme (an evolutionary history). Present day life forms suggest common ancestors too: scales on birds recall the hypothesized reptilian ancestor, and the duckbill platypus lays eggs like a reptile yet nurses its young like a mammal. Similarities among species are also found in their embryology, immunology and genetic makeup.

Reprinted from *Illinois Issues*, August 1981

Gun control: moving to the home front

By JOHN J. McCARTHY

With the rise of violent crimes and assassination attempts, the issue of handgun control is on the agenda for debate. Is owning a gun a personal right? Or a societal danger? With federal action ineffective to control handguns, anti-handgun groups are moving the battleground to state and local governments

THE DAY AFTER President Reagan was shot, House Speaker Tip O'Neill told his colleagues not to expect any handgun control legislation this year. Five weeks later Pope John Paul II lay in critical condition in a Rome hospital while U.S. Rep. Tom Railsback (R., Rock Island), a senior member of the House Judiciary Committee, admitted, "It will be very tough to get handgun legislation through this Congress."

What O'Neill and Railsback know is that the gun lobby already is way ahead of the anti-handgun groups. The gun lobby is surely one of the strongest single-issue pressure groups in the country and while it clearly represents a minority, it is a minority that sends post cards when it is told to and speaks in unison when it lifts its voice. Those who want to see handguns controlled could well take lessons from gun lobbyists, and there is some evidence that is occurring.

While the Congress fretted,a pair of the country's strictest handgun control proposals reached the floors of the New Jersey and Connecticut legislatures; Chicago hosted one of the biggest anti-handgun rallies in U.S. history; and the National Alliance of Handgun Control Organizations held its first conference. The national anti-handgun groups got the message: the fight for handgun controls begins at home.

"We're spending as much of our time, efforts and finances as we can on the state and local campaigns," said Mike Beard, executive director of the National Coalition to Ban Handguns. "Congress won't take the initiative on this issue unless it comes from the ground up."

According to Kathy Zartman, president of Illinois' Chicago-based Committee for Handgun Control, local groups want three things that have up to now been denied them in Washington: the opportunity to build grass roots support, show politicians that gun control is a politically viable issue, and notch the victories that every movement needs to maintain interest and popular support.

In Illinois, however, the victories won't come easily.

Gov. James R. Thompson contends the state has enough handgun laws already and supports more stringent enforcement of those laws, something he thinks could be accomplished if "citizens . . . take their responsibility in the judicial selection process more seriously." State Rep. Michael Getty (D., Dolton), a member of the House Judiciary II Committee, which passes on all proposed gun legislation, thinks state and local handgun control campaigns only dilute national efforts.

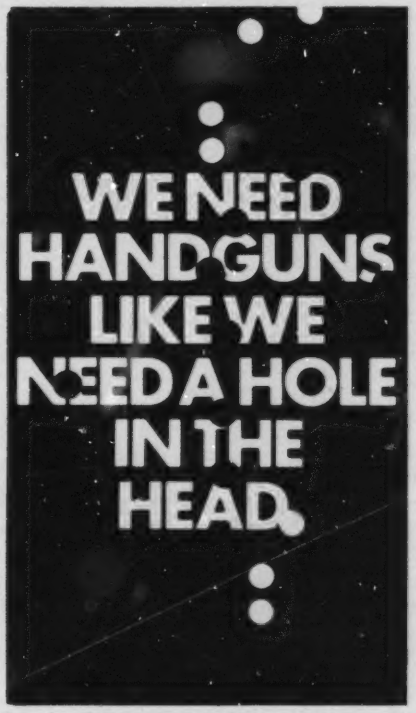
Even the *Chicago Tribune*, a strident supporter of a strong national gun registration law, labels anything less than comprehensive federal handgun control "virtually pointless." The Bloomington *Pantagraph* has backed tough penalties for handgun crimes, police review of gun owners' applications, and a 10-day handgun buyers' waiting period, but editor Harold Liston terms a handgun ban at the state level "impractical."

Federal gun control

Much of the skepticism about strong state gun controls undoubtedly springs from the failure of state and national gun laws already in force. Many of them are stunning examples of legislation so mitigated by compromise that only the illusion of a solution remains.

The federal Gun Control Act of 1968, for example, the most recent of three national firearm bills passed since 1934, was supposed to deny guns to minors, convicted felons, mental defectives and drug addicts; control interstate traffic in firearms and ammunition; and end the importation of small, cheap handguns "unsuitable for sporting purposes," like the notorious "Saturday night specials."

The act has a few problems. One is that registration requirements govern only the gun's initial purchase from a licensed dealer. No one knows the total number of firearms in any particular community because no one keeps track after the first sale. According to federal law, any private handgun owner who wants to sell his gun may legally do so to any other private individual, no matter what that person's police record, drug record or mental state may be, as long as the buyer convinces the seller that they both live in the same state. These largely unregu-



lated private transactions make up 30 to 50 percent of all gun sales. The feds maintain no centralized listing of gun purchases.

The law's attempt to control interstate firearm traffic relies upon compliance from commercial gun dealers, but a commercial license is so simple and inexpensive to get that the U.S. Treasury Department's Bureau of Alcohol, Tobacco, and Firearms (ATF), which administers and enforces the act, admitted in 1975 Congressional testimony that less than 30 percent of its 180,000 licensees actually ran bona fide businesses, making effective enforcement nearly impossible.

Dealers licensed under the act don't have to verify the buyer's personal data, so credentials can easily be falsified. To submit false credentials is a felony punishable by up to five years in prison, but according to ATF spokesman Les Stanford, "it happens all the time."

It happens because there's no one to enforce the act. In fiscal year 1979 ATF spent a total of only eight man-years policing more than 35,000 dealers in their nine-state midwest region.

The act's ban on cheap, foreign-made handguns originally cut imports by more than 25 percent; but, because the ban did not affect the importation of handgun parts, guns entered the country in pieces and were simply assembled in the U.S. And since the manufacture of cheap *domestic* handguns was not limited by the act, the handgun market soon revived and prospered.

Faced with all these problems, Stanford admits that "The deterrent effect of the '68 Act is certainly limited."

Illinois' gun laws

Given the federal government's handgun control mess, several states, including Illinois, have attempted to tackle the problem themselves. The Illinois state legislature, for example, has passed laws which prohibit federally licensed gun dealers from selling, manufacturing, or delivering Saturday night special type guns to an unlicensed person; requires a three-day and one-day waiting period before receiving handguns and long guns, respectively; bans unauthorized carrying of a concealed weapon; and requires each firearm owner to apply for and carry a Firearms Owner's Identification (FOID) card. The FOID card application process, the centerpiece of Illinois' gun laws, was designed to prove that the applicant is over 21, has no history of narcotics addiction, and has not been committed to a penal or mental institution in the last five years. In general, this is the same kind of firearm purchasers' information the federal government demands but does not verify.

The hitch, as pointed out by Timothy DaRosa, assistant chief of the Bureau of Identification of the Illinois Department of Law Enforcement (DLE), is that the applicant does not have to apply for the card in person and the DLE computer only checks the applicant's name against a list of "ineligible" persons. Applicants can submit phony names and addresses and receive valid FOID cards. Of the 200,000 firearm owners who annually apply for a FOID card, DLE's computer catches 3,000 to 4,000 cheaters every year. But no one knows how many of the state's 1.3 million current cardholders are actually eligible.

DaRosa suggests that FOID card abuses could be nearly eliminated if applicants were required to apply in person, show several forms of identification, and be fingerprinted. He estimates that a verified fingerprint check system would cost the applicants about $5 per year. Currently gun owners pay $5 every five years for their FOID cards.

Several proposals for fingerprinting gun owners were introduced in the Illinois legislature this session by Rep. Carol Mosely Braun and Sens. John D'Arco and Earlean Collins, all Chicago Democrats, but their bills met with resounding defeat.

FOID statute prosecution is compromised, according to DaRosa, because the crime is only a Class A misdemeanor. Police and prosecutors, concerned primarily with major crimes, give it reduced priority. Though estimates of the number of illegal firearms in Illinois exceed 200,000, in 1979 Illinois police arrested only 1,033 persons for carrying or owning a firearm without a valid FOID card. Statewide conviction statistics are not available.

Some Illinois municipalities have attempted gun control by passing ordinances that meet or surpass the state's registration requirements. In fact, 10 Illinois cities require a written permit from the police department to purchase a firearm, another 26 demand permits for handgun purchases only, three outlaw handgun sales and three prohibit all firearm sales.

Though well-intentioned, the problem with local gun laws is that you can always buy what you want somewhere else in the state

Though well intentioned, the problem with local gun laws is that you can always buy what you want somewhere else in the state. If the Evanston police chief won't allow you to buy a derringer, go to Des Plaines or another town.

In Chicago, for example, home of at least 400,000 legal and illegal handguns, all firearms must be registered.

Due to extremely tight purchase requirements, it is virtually impossible to buy a handgun in Chicago. So gun owners buy them legally outside the city limits and then register them with the city.

Because federal investigators concentrate on major firearm cases and DLE's Bureau of Identification has no FOID enforcement unit, the local police bear most of the responsbility for enforcing gun laws. They also face the consequences if the gun laws are not enforced. Perhaps that's why Chicago police have found their own way to enforce the gun statutes: confiscation. Chicago leads the country in confiscation of illegal guns, with 15,000 to 20,000 annually. But this doesn't translate into convictions and jail time. Most gun confiscation cases are thrown out of court for technical violations, often because of illegal police searches. The guns, however, get thrown in a furnace. Confiscation probably does some good, but Chief Judge Joseph Cunningham of Illinois' 20th Judicial Circuit, a close observer of East St. Louis' 13-year-old gun confiscation program, sees its limits. "All we've done is improve the quality of guns in the community," he said. "I don't know if it's reducing gun use."

Chicago police have found their own way to enforce the gun control statutes: confiscation. Chicago leads the country in confiscation of illegal guns, 15,000 to 20,000 annually

In short, Illinois' gun registration laws don't stop violent crime. Tied to tragically ineffective federal firearm provisions and weak enforcement policies, they're part of a whole system of toothless statutes. The recent handgun attacks on prominent individuals, however, have sparked growing interest in more significant state and local controls. Three of the most controversial legislative proposals concern mandatory sentencing for gun law violators, bans on handgun possession, and extension of municipalities' home-rule power to enact gun control ordinances.

Mandatory sentencing bills usually are aimed at deterring handgun felonies. State Sen. William Marovitz (D., Chicago) sponsored S.B. 1051, which won unanimous approval in the Senate Judiciary II Committee and provides Illinois' best example of this strategy. It would set a mandatory three-year prison sentence for anyone convicted of using a firearm in the commission of a crime. In other words, it proposes to increase sanctions against crimes that already have not been staunched by one of the most severe sentencing schemes in the country.

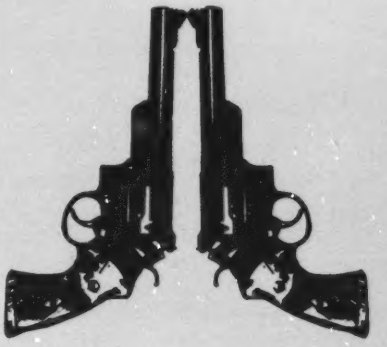
Handgun control proponents might argue that Marovitz' bill aims at the wrong crime. They would hold that if poorly enforced laws do not dissuade someone from carrying a handgun, he will eventually find himself drunk and upset enough to use it in a spontaneous murder, assault or robbery. So, control advocates say, make and enforce tough penalties that prevent him from carrying a handgun — it may be almost impossible for the criminal justice system to prevent him from using it.

Mandatory sentencing

In 1975, Massachusetts passed a tough law targeted at handgun carriers. It set a one-year mandatory sentence for anyone convicted of carrying an unlicensed handgun and heralded the law's passage with a $2 million advertising campaign explaining it and warning ominously of the certain one year in prison.

In an evaluation of the law's first two years, the Center for Applied Social Research at Northeastern University found that handgun homicides in Boston dropped by 55 percent while overall criminal homicide decreased by 39 percent. They attributed much of the reduction to the mandatory sentencing bill. Researchers also found a "widespread weapons substitution effect" as former gun carriers switched to other, less lethal weapons. But surprisingly, Glenn L. Pierce, assistant director of the Center, believes the most effective aspect of the bill was not

The NRA v. anti-handgun lobbies



THE PHILOSOPHICAL and political differences between the gun lobby and the anti-gun forces hinge on three major issues: Do guns or people kill people? Are handguns effective for self-defense? Do Americans have a constitutional right to bear arms?

Of the 1,199 victims of murder and voluntary manslaughter in Illinois during 1979, 55 percent died from a handgun bullet. Fifty-three percent of them were shot by a lover, friend or family member who killed in a fit of rage. Handgun control proponents reason that for this majority of murderers, more severe criminal sentences would provide no deterrent whatsoever. So, to lessen the fatal consequences of these irrational crimes of passion, they believe the instrument of death — the handgun — has to be eliminated.

Handguns kill three times more victims than shotguns and rifles combined — even though the country has at least twice as many long guns than handguns. Gun control advocates argue therefore that without a handgun the enraged potential killer would not simply substitute a rifle — for which they are seeking no ban — he'd grab a knife. Though knives are five to ten times less lethal than handguns, they are the second most frequently used murder weapon.

"Lethal weapons are used to win a fight or wreak vengeance or injury," writes Professor Franklin E. Zimring of the University of Chicago's Center for Studies in Criminal Justice, "whether or not this means that death will result." So the anti-handgun lobby believes the reason a huge number of aggavated assaults turn into murders is the availability of a handgun. Zimring notes that "there is a great deal of similarity between attacks that kill and serious assaults that do not: fatal attacks and non-fatal attacks involve the same kinds of people in the same kinds of situations, and take place during the same days

By JOHN J. McCARTHY

and hours."

Noting homicide's social characteristics, gun control advocates hold that anyone could commit a handgun crime of passion if put in the right situation. ("My rules for handgun safety are: don't have kids; don't drink; don't get mad at your wife; and don't have a temper," Zimring cracked at a recent conference.) The most orthodox of the handgun control proponents support legislation rooted in the assumption that everyone does *not* have a right to own a handgun. Under their "ideal" control system, an individual would have to prove to the government why he should own a handgun. Today, the government has to prove why he shouldn't.

The National Rifle Association (NRA), the 1.7 million member group opposed to handgun control, rebuts its opponents' argument with the reminder that less than 1 percent of the approximately 60 million handguns in the country are involved in criminal activity in any given year. They demand that all handgun owners not be restricted because of the crimes of a few.

NRA research coordinator Paul Blackman also disputes the FBI's statistics on the number of "crimes of passion."

"Listening to the gun control arguments, you'd expect that about 70 percent of all murders are committed by people who are law-abiding in every other respect," he says. "Actually, 70 percent of all murders are committed by repeat violent offenders. Of cop killers 25 to 30 percent know the cops they kill but the FBI rates those murders as 'murders between acquaintances.'

"For the most part, criminals kill. And the laws should control only *their* behavior, not that of the entire gun-owning public."

Zimring responds: "More than 70 percent of all criminal homicides in Chicago are committed by people without prior felony convictions. Maybe 90 percent have been *arrested*, but that doesn't make them offenders. . . . It's appropriate for the NRA to sell their values but they can't make up the facts."

The reason for the immense and growing popularity of handguns is protection. One-half to two-thirds of all handgun owners purchase their weapons for self-defense. What they may get is self-delusion.

The key element in home or street robberies, two of the most feared crimes, is surprise. Both happen so quickly that victims have little chance to use their guns. Only about 2 percent of home robberies end in injury or death to the robber by firearm, even though nationally 50 percent of all households have a firearm.

The fear of injury in the course of a robbery far outweighs the actual threat. In 1979 only 1.9 of every 1,000 Illinoisans were robbed and only 2 percent of robbery victims can expect to be hospitalized due to their injuries (in Illinois, 4 of 100,000). Though researchers have found that gun ownership has a notable effect in reducing "undefined fear," that benefit is offset by the fact that a family member is four to six times more likely than a burglar to be killed by a gun kept in the home.

But the NRA believes deeply in guns for self-defense. Their own opinion polls found that "13 million Americans live in households in which a family member had to use a firearm for protection." They also point out that according to the National Safety Council, accidental firearm deaths account for less than .001 percent of all U.S. deaths.

The NRA also contends that the U.S. Constitution protects the individual's right to own a firearm. Yet four separate U.S. Supreme Court decisions, dating back to 1875, have ruled that the Second Amendment ("A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.") was designed to protect the individual states from invasion and victimization by the federal government, not to protect individuals from burglars and robbers. The Supreme Court also ruled that personal firearms do not have a "reasonable relationship" to the preservation of a state militia.

The Supreme Court notwithstanding, the NRA continues to maintain that the Second Amendment confers an individual right to carry a gun. A sizable contingent of their supporters continue to view themselves as watchdogs of freedom, alert for signs of takeover, particularly from within. An NRA publication on the right to bear arms entitled, strangely enough, *Gun Control*, opens with a 1928 quote from Supreme Court Justice Louis Brandeis: "The greatest dangers to liberty lurk in the insidious encroachment of men of zeal, well meaning but without understanding."

In any case, the debate continues at the national, state and local levels.

the harsh sentencing, but the fear-inducing advertising that preceded it.

"The people of Massachusetts were not afraid of the actual threat of prosecution," Pierce comments, "but the perceived threat of prosecution."

In fact, since 1975 less than 40 Bostonians annually have been sentenced to the year in prison, causing Pierce to question the long-term gains of the law as Massachusetts' citizens realize that their chances of imprisonment are remote.

Apprehensions have also surfaced about mandatory sentencing in general.

Legislators tend to set such severe mandatory sentences that state's attorneys often hesitate to prosecute, preferring to plea bargain the charge to an offense with a less strict penalty. Mandatory sanctions also increase prison populations which, in Illinois, have already surpassed capacity.

"It's madness," wails Franklin E. Zimring of the University of Chicago's Center for Studies in Criminal Justice. "We don't know whether mandatory sentences for handgun crimes are effective or not, but I do know that you don't try a one year mandatory sentence before you try a one *day* mandatory sentence."

That's exactly what East Cleveland, Ohio had in mind when they began assessing fixed five-day sentences for persons convicted of carrying concealed weapons. Though researchers have not yet published their findings on this strategy, initial data indicate that local judges and prosecutors have levied the prescribed penalties equally and often.

The most controversial and least politically feasible legislative alternative is a complete ban on handgun possession. No state or local jurisdiction in the country had passed such a law, until Morton Grove did in June. This "ultimate" form of handgun legislation first startled Springfield last spring when, soon after Reagan's shooting, the Senate Judiciary II Committee voted along straight party lines to pass Sen. John D'Arco's bill banning handguns statewide. But the bill soon died on a 16-34 floor vote. And the legislature next moved to preempt Morton Grove and any other city from a complete ban on handguns, but this attempt was postponed.

A phalanx of procedural and enforcement problems would follow the passage of any "ban bill." Besides the immediate Second Amendment legal challenges, state or local governments would have to consider the just disposition of huge numbers of legally acquired handguns already in existence which in many cases represent significant personal investment for their owners. Probably about 20 percent of Illinois households have a minimum of one handgun. A state "buy back" program for these 800,000 weapons would certainly cost more than $60 million.

An enforceable, effective handgun ban would have to be preceded by a dramatic reduction in handgun demand. Without it, compliance would probably be minimal and a flourishing black market in the sale and importation of handguns would ensue. Due to the widespread disregard for the law, enforcement and sentencing would be haphazard and unequal.

Though the chances of passing a handgun ban without overwhelming public support are slim, control supporters realize that without such support the problem would remain.

"Until Americans get rid of those handguns or fail to acquire new ones," Zartman of the Committee for Handgun Control acknowledges, "until that's the prevailing opinion, we will have a terrible handgun problem."

Though state Rep. Barbara Flynn Currie (D., Chicago) ritually introduces a handgun ban bill every legislative session, there's little chance that Illinois would adopt a handgun prohibition without a series of intermediate steps. One of those could have been H.B. 570, introduced by Rep. Harold Katz (D., Glencoe) and authored by Franklin Zimring, but defeated in committee months ago. It would extend the home rule powers of a municipality so that the sale of a handgun in Illinois would be governed by the local ordinance of the *buyer's* residence rather than the seller's. In other words, an Evanston resident could *not* go to Des Plaines or any other city to buy the derringer denied him by Evanston's chief of police.

The key to Katz' bill is enforcement, which is why backers of the proposal have recommended a companion bill that would put handgun dealers under liability clauses similar to the "dramshop" laws that hold bartenders liable for the actions of patrons they have served to the point of inebriation. In the case of handgun sales, gun dealers would be liable if they sold handguns illegally to buyers who then used them to commit crimes including the crime of illegal handgun possession. Gun control supporters feel that a dramshop provision would allow the Katz bill to almost enforce itself.

In justifying strict local laws, handgun control supporters often cite the recent study of the U.S. Conference of Mayors' Handgun Control Project, which found that Washington, D.C. experienced a 26 percent drop in firearm homicides after it froze the number of legally owned handguns in 1977. A follow-up analysis by the U.S. Department of Justice also suggested that the District's handgun statute reduced handgun homicides. The department, however, stopped short of an absolute endorsement and called for a more detailed review of the law's effectiveness.

Regardless of the laws and the studies, fear and the need for protection will remain, especially in high crime areas

The gun lobby counters by blaming "social factors" for crime fluctuations and disputes the research techniques of their opponents.

Regardless of the laws and the studies, fear and the need for protection will remain, especially in high crime areas.

"The real violence is . . . in the ghettos," says University of Illinois sociology professor David Bordua. "Carrying a gun in those areas may be statistically irrelevant as protection. It may be personally stupid. But in those areas why is that personal stupidity more stupid than relying on an irrelevant public safety stupidity like the Chicago Police Department?

"If you take away their guns you've got to give them something else . . . Now what are you going to give them?"

During the summer a special handgun control subcommittee of the Illinois House Judiciary II Committee will hold public hearings throughout the state on the gun control issue and specifically the eight bills currently before the full committee, including a revised edition of the Katz bill and a reworked Currie handgun ban proposal. As the chairman, Rep. Emil Boucek (R., Western Springs), and his subcommittee make their way around the state, they will have the opportunity to meet face-to-face one of the most influential and successful political coalitions in Illinois — the gun lobby.

"There's about 15 gun collectors' groups in the state," says Les Field, the legislative representative for the Illinois Gun Collectors Association. "I'm not sure how many total members we have."

Field did mention, however, one gun organization based in Olney called "Citizens Fighting Gun Confiscation," which he says has a membership of "35 to 40 thousand." In comparison, Illinois' Committee on Handgun Control, the largest state and local anti-handgun organization in the country, has a slightly smaller membership.

Nationally, state gun collectors' clubs and rifle associations can count on a membership of nearly five million, and the NRA has over one and a half million members. No matter how many there are in Illinois, they've made an impact. When D'Arco's ban bill sailed through committee, it made

the front page of *Gun Week*, a national weekly newspaper for gun enthusiasts. A few days later, the state legislators felt the full impact of the democratic process.

"I got so many letters on D'Arco's bill . . .," says Boucek, "and we [the House] didn't even have the bill."

State Rep. Peg Breslin (D., Ottawa) had one letter in favor of the bill and "three to four hundred" against.

"I've never seen any subject generate such interest," said freshman representative and Judiciary II Committee member Jill Zwick (R., Dundee). "They filled up pads of telephone messages. I don't know why it means so much to them."

Rep. John Cullerton (D., Chicago) remarked, "I talked to one NRA guy who thinks this flap over D'Arco's bill is good. He said they hadn't pulled out their mailing list in six years and this gave them an excuse."

'I talked to one NRA guy who thinks this flap over D'Arco's bill is good. He said they hadn't pulled out their mailing list in six years and this gave them an excuse'

Lobby pressure

The gun lobby, of course, is not omnipotent. Former Illlinois Congressman Abner Mikva, a bitter enemy of the gun lobby, beat them regularly though they spent lavishly to unseat him. Dozens of other congressmen throughout the country have overcome NRA opposition in the last several elections. The gun lobby has simply harnessed and organized their supporters so that what represents a minority viewpoint intimidates the majority.

And the gun lobby *is* the minority. Over the last 20 years, national public opinion surveys have indicated a consistent 60-70 percent of the country backs tougher controls on the sale of handguns. A 1980 Gallup poll found that 68 percent of non-gun owners and 48 percent of gun owners favored enhanced controls. In the process of determining that approximately 20 percent of all American households own at least one handgun, the Gallup poll revealed that 42 percent of non-handgun owners and 18 percent of owners would support a law prohibiting handgun possession.

To date, however, the gun lobby's solid single-issue politics has state representatives' attention. They know that the pro-gun letter writers will not only "vote the issue" but could also be moved to work against legislators who vote contrary to the lobby's wishes. The typical gun control sympathizer, on the other hand, is much less single-issue oriented and cannot be counted on to either vote or work for a pro-control politician. Anti-handgun sympathizers are not an organized, committed faction that politicians may fear alienating.

Some anti-handgun supporters, notably Pete Shields of Handgun Control, Inc., have called for a counterbalancing singlemindedness in the control camp, but in Illinois no such strategic consensus has been reached.

Why do so many feel the need to own a handgun?

In Pawnee, Illinois (pop. 2,500), cut out of the soybean fields south of Springfield, they sit at Herbie's Cafe and they're afraid. "We got two cops but we need 20," says farmer Wayne Lederbrand. "They spend all their time catching speeders rather than looking for burglars and robbers."

"Take away your guns and you've lost the last line of defense," Pawnee engineer Ed Campbell believes.

Why do others feel handguns should be controlled?

On June 6, in a bar at night, Chicago's deputy police superintendent is shot to death. The accused killer is a well-educated businessman who allegedly carried an illegal concealed handgun for protection.

Who has a solution? The individual who chooses to use a handgun or the government legislating control?□

John J. McCarthy is a Chicago-based freelance writer and a consultant for the John Howard Association.

THE CUTBACK AMENDMENT: A SPECIAL REPORT

Amply illustrated and containing a number of graphs and charts, this 36-page study delineates the origins and effects of cumulative voting and recounts past efforts against it; the study closely examines the recent, successful campaign to eliminate cumulative voting, and explores the welter of contentions surrounding this unique method of voting. The debates of the 1970 Constitutional Convention and the reduction of the size of the Illinois House are discussed fully.

This booklet is of special value to libraries, instructors who offer courses on Illinois government and politics, and individuals interested in state public affairs.

Single copy price: $4

(A discount of 20% will be given for orders of 15 or more.)

Send orders to Illinois Issues *(for address, see box on inside front cover)*

Reprinted from *Illinois Issues*, February 1982

New open meetings law: visions and revisions

By DONA GERSON

In existence since 1957, the Illinois open meetings law continues to suffer from a lack of definition. Enacted to prevent important decisions from being made without public scrutiny, the law and its newest revisions may have other unintended results, especially at the local level

"TALKING to local officials about open meetings is like talking to rabbits about planned parenthood. It's hard to get their attention," said one observer. But there is no question of attentiveness today because significant changes in Illinois' open meetings law went into effect on January 1, 1982. The amendments seek to strengthen and clarify the law, but some critics warn of problems ahead.

This is the third generation of open meetings laws in Illinois. A law regulating the meetings of public agencies was first enacted in 1957. Substantial amendments were made in 1967, however, including this statement of public policy:

> *It is the public policy of this State that the public commissions, committees, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of this Act that their actions be taken openly and that their deliberations be conducted openly.*

The Illinois Supreme Court cited this policy when it ruled in December 1980 in the case, *People ex rel. Thomas J. Defanis, State's Attorney* v. *Joan Barr et al.*, that the law covered informal as well as formal meetings. "This clearly enunciated public policy" would be poorly served, according to the court, if an informal caucus of nine members of the Urbana City Council were regarded as an exception to the open meetings requirements. Noting that the 1967 amendments deleted the word *official* before the word *meeting*, the court stated, "Palpably, the amendment was intended to include unofficial or informal meetings within the Act."

This case of the so-called Urbana Nine pointed up a critical problem for every member of a county, city, village, township, school district or special government board. And that problem was that while the more than 40,000 local officials in Illinois knew they were required to have open meetings, there was no definition of *meeting*. The law didn't define it. Former state Rep. Anthony Scariano of Park Forest (so closely identified with the 1967 amendments that they are often referred to as the Scariano law) said that the General Assembly chose not to define meeting in 1967. Scariano said it decided to leave the definition up to the courts. That surely created confusion for local officials. Thirteen years later there was no consistent definition arising from the appellate court cases, and local officials who were subject to penalties — modest Class C misdemeanor penalties it's true, but nonetheless criminal penalities — were not really sure when they might be violating the law.

Even in its 1980 decision, the first it had rendered on the 1967 open meetings law, the Illinois Supreme Court did not define meeting, and it specifically restricted the potential scope of its decision. While a majority of the court found that the pre-arranged meeting of nine members of the then 14-member Urbana City Council violated the law, it also stated, "Whether the Act applies to other meetings and whether it is constitutional in other settings or as applied to other public officials must await further determination."

This left the members of the more than 6,500 governments in Illinois, their municipal attorneys and the vitally interested news media to speculate whether the "decision under the narrow facts presented" was or was not analogous to other situations in other governments in Illinois.

If the Illinois Supreme Court had defined meeting, it would have made life much easier for Tyrone Fahner, who was appointed Illinois attorney general at the end of July 1980. Within two weeks he issued an opinion on the open meetings law, an opinion that related to notice requirements for closed meetings but did not attempt to define meeting. Fahner's much criticized opinion was that legally closed meetings did not require prior public notice. While this opinion may have been out-

When closed meetings are permitted for discussion

Exceptions to the open meetings law which affect school boards and municipal government:

- **Collective bargaining negotiations**
- **Acquisition of real property**
- **Litigation which is pending or probable or imminent***
- **Appointment, employment, dismissal or complaint regarding an employee or officer**
- **Executive or administrative matters of a commission form of municipality organized under Article 4 of the Illinois Municipal Code***
- **Appointment of a member to fill a vacancy on that body**
- **Campus security**
- **Student disciplinary cases**
- **Individual students in special education**

*New items in P.A. 82-378, which amend the open meetings law, *Illinois Revised Statutes* 1979, ch. 102, sec. 42.

side the philosophy of open meetings, it was inside the language of the Illinois law, according to Fahner; but when eyebrows were raised, Fahner said, "Let's get to work on revising the law," and he did, immediately.

That meant grappling with all of the complexities inherent in the definition of meeting. Was it a meeting if two school board members had lunch together? If three aldermen met at a party? It was a hot potato, and Fahner had caught it.

Need for changes

In addition to the need for a definition of meeting, there were other problems with the 1967 open meetings law. For one thing, the law allowed closed meetings when a pending court proceeding was being discussed but made no provision for instances where litigation was very likely. For another, the law, which requires public bodies to give annual notice of the dates, times and places of regularly scheduled meetings and 24-hour notice of special meetings, had no provision for emergency meetings.

Then there was the matter of penalties. Criminal penalties had simply never been applied in Illinois. And while the court had the authority to issue a writ of mandamus, cases often arose *after* an alleged illegal meeting when a writ would be meaningless. Some felt that other sanctions should be considered.

Possibly the strongest indication of the need for improving the open meetings law were the endless inquiries, calls and questions received at every office where a public official or a representative of the media might reasonably expect to find an answer.

Defining meeting

The 1967 Illinois law required that *deliberations* as well as *action* be taken openly. But since the term meeting was undefined, the number of members of a public body who could gather together for any purpose was uncertain.

Originally Fahner suggested that any gathering of two or more members of a public body constituted a meeting. But the threshold of two was criticized and "a majority of a quorum" was substituted. Ultimately, the definition which was incorporated into the law attempts to combine a quantitative standard with intent: "Meeting means any gathering of a majority of a quorum of the members of a public body held for the purpose of discussing public business." Note that the word *discussing* and not *deliberating* is used.

A majority of a quorum is a new concept. The theory is that since a quorum can act on behalf of the governing body, a majority of a quorum is sufficient to carry a motion. But there may be problems with this new quantitative measure.

Rep. Dwight P. Friedrich (R., Centralia) noted in debate on the floor that the city councils in downstate areas consist of a mayor and four council members. Therefore, a quorum is three and a majority of a quorum is two. Friedrich said that it's common for them to get together for lunch, and it would be absurd to require them to call the media every time two of them sat down to eat. Yet a strict interpretation of the new provision might demand that. He suggested the threat of criminal action will make it difficult to get responsible people to run for office.

Rep. Friedrich has suggested the threat of criminal action for violations of the open meetings law will make it difficult to get responsible people to run for office

Rep. Jim Reilly (R., Jacksonville), chief sponsor of the Fahner bill, H.B. 411, responded that *intent* is the crucial element. If members of a public body do not meet for the purpose of discussing public business or use a social occasion as a cover for discussing public business, Reilly said they "can drink all of the coffee they want." Rep. Steve Miller (R., Danville) asked, "Is specific intent an element that would need to be proved to prove a violation of this Act?" Reilly said it would. However, at another point in the extensive colloquy that accompanied passage of H.B. 411 in the House, Reilly said that the intent could develop at the social occasion itself.

The list of public bodies covered by the newly amended open meetings law appears exhaustive with one significant exception — the Illinois General Assembly. The law says:

> *"Public body" includes all legislative, executive, administrative or advisory bodies of the state, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees or commissions of this State, and any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees which are supported in whole or in part by tax revenue, or which expend tax revenue, except the General Assembly and committees or commissions thereof.*

This apparent direction to "Do as I say, not as I do" is shocking to many, especially considering the moralistic tone that permeated the discussion of the open meetings legislation. If it is the public policy of this state that deliberations and actions be taken openly, why is the General Assembly excepted? Supporters of this exception claim that the General Assembly is governed by the more stringent limitations of the Illinois Constitution which requires a three-fifths vote to close any meeting of either house. But that completely sidesteps the major issue which arises from that old bugaboo, the definition of meeting. Gatherings of a majority of a quorum of the General Assembly for the purpose of discussing public business are frequently not open to the press or public. Closed caucuses, generally along party lines, go on constantly and conspicuously in the General Assembly. That's where many decisions are made.

Such political caucuses are an integral part of the American political process at every level of government, and the new open meetings law, while exempting the state legislative caucuses, poses a serious threat to those at the local level. Political science professor Dick Simpson of the University of Illinois at Chicago Circle, who served two terms in the Chicago City Council, feels that caucuses must be protected at all levels. "There is a need to caucus to frame legislation and discuss strategy," says Simpson. "A caucus is necessary so members can know in advance what motions will be made . . . . if the other side knows your stra-

tegy, they can block you. What is important to the public is the final debate, not the tactical decisions made in strategy sessions." Simpson thinks a strong open meetings law is of prime importance to prevent secret meetings, but he feels it is at least as important to also acknowledge and protect the right to caucus.

"A caucus allows for give and take," says political science professor Samuel K. Gove, director of the Institute of Government and Public Affairs, University of Illinois at Urbana-Champaign. Open meetings laws that prohibit caucuses at the local level have "gone too far," according to Gove.

Arnold Blockman, attorney for the Urbana Nine, discussed the need to caucus in the brief he prepared for the Illinois Supreme Court:

From a policy standpoint, a party caucus of some council members is too far remote in the decisionmaking process to be subject to open meeting legislation. Politicians need to be able to privately accumulate information, privately sample public opinion, and privately discuss the political ramifications for possible programs in order to effectively perform their public functions.

Many people feel that the threshold number for a meeting should be set at the quorum level (as it is interpreted in Ohio, New York, Kentucky, Michigan, Nevada, Oregon, Tennessee, Arizona and Idaho) or that the right to caucus should have been explicitly stated (as it is in Connecticut).

Both the right to caucus and the right to preliminary consideration could have been protected if a distinction between deliberation and discussion were delineated as proposed by Arthur M. Sussman in his article, "The Illinois Open Meetings Act: A reapraisal" (*Southern Illinois University Law Journal*, 1978, No. 2, p. 221). Sussman writes:

I submit that if we desire quality in our public decisionmaking, we must be willing to accept the need of government for privacy during the preliminary stages of decisionmaking.

The present interpretation of the Open Meetings Act which prevents private discussion unless they are about certain topics, weakens the public decision making process. A new interpretation by which "deliberations" are understood to exclude preliminary discussions will . . . allow the . . . Act to more effectively carry out the legislative mandate — "to aid in the conduct of the people's business."

However, the new definition of meeting specifically refers to a "gathering . . . for the purpose of discussing public business."

Closed meetings

In some instances, the reasons for open meetings — the right to information and participation, the access of the media — are overridden when the public purpose would be better served by confidentiality in such cases as the purchase of property by a public body. And privacy is regarded as more important than the public's right to know in cases involving public employees or officers, or in cases of student discipline.

A Senate amendment to H.B. 411, which was adopted, allows an additional exception for commission forms of local government so that cities such as Springfield and East St. Louis may deal with executive or administrative responsibilities in closed sessions. Without this exception, day-to-day business operations would be nearly impossible given the new definition.

A more significant change which affects every local government allows a closed meeting for discussion of litigation that is pending or when such action is *probable or imminent*. These new words in the law are not intended to open Pandora's box. Rep. Harold A. Katz (D., Glencoe) of the Democratic Minority Task Force which put forth this idea, made certain the legislative record included the intent of the drafters when he posed a pointed question to Rep. Reilly during House debate:

Katz: "What would prevent a public body from meeting privately as a matter of routine with legal counsel to discuss just about any public matter because potential litigation could emerge from almost any type of discussion?"

Reilly: "It's clearly the intent of the language to mean that only potential litigation of a specific nature can be discussed at a closed meeting . . . . It is not the intent of the legislature that a public body can meet in closed session simply because its attorney is present and on the mere assumption that something might emerge during the discussion involving 'potential litigation.'"

The new law makes clear that the on-

New provisions of Illinois open meetings law

- **Meeting** means any gathering of a majority of a quorum of the members of a public body held for the purpose of discussing public business.
- **Written minutes** of all meetings, open or closed, must include date, time and place of meeting, members attending, general description of meeting and a record of any votes taken.
- **Electronic recording** of the proceedings of an open meeting may be made by **any person.**
- **Agenda** must be included in the 24-hour notice of special, rescheduled or reconvened meeting.
- **Notice of an emergency meeting** must be given prior to holding such a meeting to any news medium which has filed an annual request for notice.
- **To close a meeting**, a majority vote of a quorum must be taken at a public meeting for which required notice has been given. Vote of each member and citation of specific exception authorizing closing the meeting must be recorded in the minutes of the open meeting.
- **Closed meetings** are authorized for litigation that is pending or when such court action is **probable or imminent**, and for municipalities with **commission form** of government to conduct executive and administration business.
- **Legal remedies** for violations include writ of mandamus; injunction against future violations; ordering minutes made public; declaring null and void any final action taken at a closed session.
- **Civil action** may be brought by any person, including the state's attorney of the county (in which noncompliance may occur or has occurred), prior to or **within 45 days** after a meeting alleged to be in violation. Court may **assess attorney fees and court costs against defendants**. Attorney fees may be assessed against plaintiffs for malicious or frivolous action.

ly exceptions to open meetings are those which are specifically stated: "Only those portions of any meeting expressly enumerated herein as exceptions may be closed. No final action may be taken at a closed session."

Other than the two changes pertaining to city commission governments and pending litigation, the list of exceptions is identical to that in the 1967 law. School officials unsuccessfully advocated an additional exception for sale of property.

Notice and minutes

Although closed meetings are allowed for specific purposes, the new law requires public notice of *all* meetings, open or closed. A closed meeting may be held only after a recorded vote of a majority of a quorum taken at an open meeting for which notice has been given. The law requires the vote of each member and the citation to the specific exception authorizing the closing of the meeting to be recorded in the minutes of the open meeting.

Another new provision requires that the 24-hour notice of special, rescheduled or reconvened meetings must include the agenda for the meeting. The new law also acknowledges the need for meetings in the event of a bona fide emergency. The law requires "that notice of an emergency meeting shall be given as soon as practicable, but in any event prior to the holding of such meeting, to any news medium which has filed an annual request for notice . . . ."

While most of the changes in the law clarify and make more precise the requirements that already existed, there is a totally new provision for written minutes of all meetings, open or closed. The minutes required are minimal: the date, time and place of the meeting; the members recorded as present or absent; a general description of all matters proposed, discussed or decided; and a record of any votes taken. Minutes of open meetings are to be available for public inspection within seven days of the approval of such minutes by the public body. The public body may make minutes of closed meetings available if it determines that confidentiality is no longer necessary. Or a court could order the public body to make available portions of the minutes of a closed meeting.

The minutes requirement has raised concerns about what must be revealed in the minutes of a closed meeting and about the burden of record keeping in general, especially for small municipalities. In an attempt to clarify a potential problem, Katz asked during debate whether the minutes of a closed meeting between the attorney and the public body to discuss a legal action that is probable or imminent must identify the party involved. Rep. Reilly said no. There may be other problems with interpretation although a technical or partial noncompliance with the minutes requirements apparently would not invalidate actions taken by the public body.

Given the complexity of many elements of the new provisions, there are endless possibilities for violations. Yet one of the difficult problems with open meetings laws in Illinois and other states is finding the proper means of enforcement. As noted above, the criminal penalty has never been imposed in Illinois, but that is not unique. Criminal sanctions are the "most common and least useful sanctions" found in open meetings laws, according to Douglas Q. Wickham in his article, "Let the Sun Shine In!" (68 *Northwestern University Law Review*, 1973). Extensive research by Wickham failed to uncover a single open meetings case involving criminal prosecution in any state. The new Illinois law, however, contains a significant new provision authorizing the court to grant injunctions against future violations of the act.

Another legislative boobytrap concerned the validity of local government contracts and bond sales. If local government action can later be declared null and voil because it took place at an "illegal meeting," contractual parties and bondholders could be severely damaged. To prevent any doubt, the new law makes clear that *final* action taken in compliance with the open meetings law is valid even if earlier actions in regard to the matter were taken at a meeting which was in violation of the law.

The new law places a 45-day time limit from an alleged violation to the filing of a civil action in court. A citizen who files suit against local officials and prevails may be reimbursed for attorney fees and court costs. To inhibit the overzealous, the act provides that legal costs may be assessed against the private party if the court determines malicious or frivolous intent.

At the conclusion of long deliberation in the House on the new open meetings legislation, Rep. Reilly said, "We are not in any way trying to hurt local government officials. In my honest opinion, this Bill makes it easier for them because they will understand what the Act means, when they can, when they can't meet in public . . . ." Rep. John T. O'Connell (D., Western Springs) said, "There is probably no more thankless job in this State than being a local official." He further added, "I think this Bill will present more harassment for local officials and be more of a deterrent for encouraging people to run for offices." The bill passed the House and Senate in July with far more than the three-fifths vote required. The law, Public Act 82-378, took effect on January 1, 1982.

The law, while exempting the state legislative caucuses, poses a serious threat to caucuses at the local level

Postscript

Amendments to the open meetings law passed the General Assembly in a year when many significant bills floundered. Atty. Gen. Fahner worked for its passage. The Illinois Press Association, long an advocate of a stronger law, capitalized on Fahner's interest and on the insecurity of legislators who want to stay on the right side of a good

government issue when they face newly drawn legislative districts. In addition to editorials supporting changes in the open meetings law, editors phoned legislators. Their message included more than the merits of the pending bill. One legislator reported that he and others received calls with a thinly veiled threat of editorial opposition in the next election if they failed to support the bill. In other words, the press lobbied, as do other special interest groups, with all the pressure and persuasion tactics available to them.

Sara Bode, president of the Village of Oak Park, has strongly criticized the new law. "Loads of us local officials work very hard and do our best to fulfill the responsibilities of office in the face of severe limits and stringent controls," says Bode. "For heaven's sake, don't act to limit us more." But Atty. Gen. Fahner, pleased to take credit in an election year for the new law, suggests that "discomfort at conducting the public business in public . . . shows a lack of intellectual ability."

Douglas Wickham, a strong proponent of open meetings laws, described the inherent conflicts in his 1973 law review article:

> *Especially in the early stages of working out a particular problem, it makes a good deal of sense for any governmental body to retain a zone of privacy within which its members can air internal disagreements. A position, once publicly taken, is not easily changed; and it seems undesirable to encourage the adoption of "first thoughts" by requiring that all collective governmental thinking be done in public . . . . The value competing against "a right to know" then is not a "right to secrecy" but an assurance of some insulation from the intense heat of public pressure. Priorities must be determined, decisions made and programs implemented. Absolute openness will detract from the overall public interest in informed and rational governmental decision.*

Perhaps we must wait for a fourth generation open meetings law to better define the boundary line between the needs of local officials and the public's right to open meetings. □

Dona Gerson holds an M.A. in political science from the University of Illinois at Chicago Circle and is an alderwoman on the Evanston City Council. She has written other articles for Illinois Issues *on key local government issues.*

Remapping: the decennial poker game

REAPPORTIONMENT is one of those occasions when no one can afford to lose. Dividing the state into election districts is an intensely personal matter. Why him? Why her? Why us? Power pure and complicated is at stake. How could it end in such a spectacle? How could it not?

It was Friday night, October 2, and only 72 hours before the last of the deadlines: midnight, October 5. That is the last date set by the Constitution for filing a new map for legislative reapportionment. The Illinois Legislative Redistricting Commission was holding its final meeting. The nine-member commission was voting on the new boundaries for the 59 Senate districts and the 118 new, single-member House districts (as provided by the 1980 Cutback Amendment), boundaries the Democrats had drawn and were about to approve by virtue of their 5-4 majority. This was the last chance legislators had to do it themselves; the last in a series of chances carefully meted out by the framers of the 1970 Constitution with the implicit knowledge that the lawmakers might fail anyway.

The commission's final, fateful meeting had drawn fair attendance: the old hearing room on the second floor of the south wing of the Statehouse — an ornate and properly intimidating chamber that once held the Illinois Supreme Court — was half full. The press corps was there in full strength. Like everyone else there, from legislative leaders and staff to assorted hangers-on, they weren't about to miss this political show of shows, a classic that wouldn't play again for 10 years. Undoubtedly, the next act would be the Republicans taking the Democrats' map to court. The Democrats would have sued the GOP if it had been the other way around. But this was the crucial scene, and reporters, like the rest of the audience, wanted to see it. Up to now, there had not even been a sneak preview; only a scene or two — outtakes or coming attractions, who could say? If this was a western, no one had seen the barroom brawl, much less the poker game. But tonight everyone would get to see the gamblers fly out of the saloon's plate glass window.

There had been one glimpse of the ongoing remap fight in June, after House Speaker George Ryan rammed a Republican map through the House. Rep. Doug Kane, a Democrat from Springfield, had "stormed the podium" trying to force his way inside the walled rostrum to confront Ryan. And there was another glimpse a few days later when Senate President Phil Rock rammed a Democratic map through the Senate. Sen. Mark Rhoads, a Republican from Western Springs, had called Rock a "son of a bitch," and Sen. Sam Vadalabene, a Democrat from Edwardsville, had punched Rhoads in retaliation. But both conflict and compromise disappeared from public view in July when the General Assembly, to no one's surprise, adjourned without approving a new map. Now the struggle moved behind the tightly shut doors of the Legislative Redistricting Commission.

As prescribed by the Constitution, the four legislative leaders appointed the members of the commission by July 10, and the four Democrats and four Republicans got down to some hard bargaining. Or so it seemed. The commission's public meetings were enigmatic to say the least. Most of them lasted only 60 seconds.

The eight-member commission was nowhere near filing a new map by the Constitution's August 10 deadline. So on August 13 (beating the next constitutional deadline of September 1), the Illinois Supreme Court nominated former Democratic Gov. Samuel H. Shapiro and former Republican Gov. Richard B. Ogilvie to be the ninth, and tie-breaking member of the commission. The process then continued its measured pace, as outlined in Article IV, Section 3 of the Constitution. On August 25, well before the September 5 deadline, Secy. of State Jim Edgar held a public drawing to select the tie-breaking ninth member. But now, it seemed as if the framers of the Constitution had themselves written a western scenario. In their poker game script for reapportionment, the winners take all: Edgar, a Republican, pulled Shapiro's name out of a hat once worn by Abraham Lincoln. Once again, remap was public spectacle.

Shapiro announced he would be a mediator, not a tie-breaker, and the

four Democrats and four Republicans went back to the bargaining table. Or so it seemed. On September 23, however, Shapiro stopped mediating and started tie-breaking. He ordered both sides to send him their maps and went home to Kankakee to wait for the mail. On the morning of October 1, a Thursday, Shapiro announced he'd drawn his own map, a composite, he said, of the 20 state and regional maps the two parties and others had sent him.

The Democrats unveiled Shapiro's map at a news conference Thursday night. The cards were on the table. By Friday morning the Republicans were calling the Democrats cheats. They held a news conference of their own Friday night, accusing House Minority Leader Mike Madigan, a Chicago Democrat who was not a member of the commission, of drawing the map himself. Shapiro, Republicans said, had been "duped" into approving it.

Now came the showdown; the Democrats armed with their 5-4 majority were going to win the high stakes bet, sweep up their chips and end the game.

It was hot under the television lights in the second floor hearing room where the nine commission members sat behind the two-tiered, semicircular dais. "Pate" Philip, the Senate minority leader, and Art Telcser, the House majority leader, were the spokesmen for the Republicans. The Republican reaction to Shapiro's map had been smoldering all day, and reporters had fanned the flames at the news conference a few hours earlier. But out in the audience their Democratic counterparts, Rock and Madigan, were calm and assured. For months they had worked behind the scenes, but tonight they were just two more spectators.

Rock stood in the back of the room and adopted his usual self-contained stance: one hand folded under the other arm, the other hand supporting his chin. He leaned to the right or left now and then to converse with this staffer or that reporter. But Madigan, who at one point was laughing with Ryan in the back of room, couldn't resist coming forward and sitting down next to reporters at the table reserved for the press. He leaned back in his chair, crossed his legs, folded his arms and grinned. The fun was about to begin.

As soon as the meeting was called to order, the Democrats moved for approval of Shapiro's map. Philip immediately accused Madigan of drawing the map; everything the Republicans had received, Philip said, had come straight from Madigan's office with Madigan's name on it. Madigan, sitting only a few feet away at the press table, just laughed. Republicans then made a substitute motion to approve their own map. As he had at the news conference earlier, Philip accused the Democrats of not giving the Republicans the required 24 hours to study Shapiro's map before the commission voted on it; the Republicans still didn't have the legal descriptions of all the districts, let alone the census tracts, Philip said. Madigan just laughed.

The Democrats disposed of the substitute motion and returned to the main motion. Telcser, taking his time, asked Shapiro if his map met the constitutional requirements that districts be "compact, contiguous and substantially equal in population." Shapiro believed it did. Telcser asked for the figures: Chicago districts, suburban districts, black districts, latino districts. Shapiro said he didn't have the figures offhand, he'd have to study the map some more. Madigan just laughed.

Telcser and Philip renewed their attack, again raising the issue of who drew the map. That was enough to set off former Rep. Corneal Davis, a black Chicago Democrat on the commission, whose preaching style of oratory is legendary. Davis shouted Philip and Telcser down. They lost their tempers, just as he probably knew they would. Madigan just laughed.

Having given the Republicans their say, the Democrats dispensed with the debate, approving the map 5-0, and proceeded to sign it. In a last futile protest, the Republicans refused to sign. It didn't make any difference.

So much for the spectacle. So much for the personalities. So much for Abe Lincoln's hat. Reapportionment involves power, something no one can afford to lose. But somebody has to; that's the way it works in a western. Reapportionment is not supposed to be political, but as the framers of the 1970 Constitution knew, it has to be political. That's the way it works in a democracy.□

By DIANE ROSS

Reprinted from
Illinois Issues,
November 1981

Reprinted from *Illinois Issues*, February 1982

Look-alike drugs

By JULIE A. DUTTON

EDITORS' NOTE: Action was taken on the look-alike drug dilemma with the enactment of H.B. 2079 (P.A. 82-968), sponsored by Frank Watson (R., Greenville), which makes both "look-alike" and counterfeit substances illegal. The law provides for forfeiture and seizure of the substances, related items and money involved in violations.

THE recent proliferation of look-alike drugs — over-the-counter drugs whose appearance mimics controlled substances — has government officials searching for legal mechanisms to halt the burgeoning trade. Illinois Atty. Gen. Tyrone Fahner has filed suit against several distributors of look-alike drugs, and the Dangerous Drugs Commission has held public hearings on the issue. The General Assembly is also considering legislation on the counterfeits.

Look-alikes are so-called because they are similar in size, shape and color, and have markings similar to controlled prescription substances, mostly amphetamines. However, the look-alikes contain a combination of perfectly legal over-the-counter drugs: caffeine (a stimulant); phenylpropanolamine (an appetite suppressant and decongestant); and ephedrine (a decongestant).

Mail-order distributors of look-alikes describe them as "legal stimulants" in advertisements placed in fashion magazines and other magazines with a large adolescent or college-aged readership. Advertising flyers have also been distributed on high school and college campuses. While the pills are sold by the distributors in mass quantities at $25 to $100 per bottle of 1,000 pills, they are generally purchased by someone who resells them "on the street" as controlled substances at a cost of 10 cents to $3 a pill.

But the "rip-off" transactions of look-alikes are hardly the most troublesome aspect of the issue. There is concern because look-alikes promote recreational drug use, expend the resources of law enforcement authorities who are pursuing illegally distributed controlled substances, and are implicated in at least a dozen deaths. According to the Illinois Department of Public Health, the look-alike drugs can induce death through respiratory failure, ventricular fibrillation or stroke. And there is always the risk of overdose should a person unknowingly obtain actual controlled drugs and treat them as look-alikes, since more look-alikes must be consumed than the controlled substances they mimic to attain the desired "high."

Controlling look-alikes is a dilemma since they do not actually contain any illegal drugs. The public hearings held in December to examine the health and legal issues of look-alikes were sponsored by a special committee of the Advisory Council of the Illinois Dangerous Drugs Commission.

Testimony by William R. Clark, director of the Chicago district of the Food and Drug Administration (FDA) pointed out that his agency's main focus is the manufacturing level of drugs. According to Clark, look-alike manufacturers are properly registered with the FDA and make the drugs to distributors' specifications, usually on a contract basis. At the manufacturers' level, look-alikes are properly labeled to show active drug content, and their packages are in compliance with current FDA label requirements for over-the-counter uses.

But at the user or "street" level the look-alikes are usually sold individually without labels and packages, leading buyers to believe they are purchasing controlled drugs. The Federal Drug Enforcement Agency (DEA) within the U.S. Department of Justice has primary responsibility for regulating drug abuse at the user level, but look-alike drugs contain no controlled substances and hence cannot be prohibited under the Controlled Substances Act.

The FDA, however, has taken action under a section of the Food, Drug, and Cosmetic Act which makes counterfeit drugs and the equipment used to produce them subject to seizure. Last September, a FDA raid on nine look-alike drug manufacturers (including one in Elgin), netted 15 million filled capsules, 20 million empty capsules with counterfeit markings, and machinery used to produce look-alikes.

According to testimony by Larry Snyder, compliance program coordinator of the north-central regional office of the Drug Enforcement Agency, the DEA is working with the FDA, the Federal Trade Commission, the Postal Service and the Internal Revenue Service in pursuing policies and actions to eliminate look-alikes. The DEA has also drafted a Model Imitation Controlled Substances Act for adoption by the states.

In Illinois, Atty. Gen. Fahner has played a vigorous role in efforts to squelch the look-alikes industry. Fahner has brought suit against more than 40 distributors of look-alike drugs. Most of the companies — including at least eight in Illinois — are charged with violating the Illinois Consumer Fraud and Deceptive Business Act, the Uniform Deceptive Trade Practices Act and the state public nuisance law.

Fahner also advocates legislation to control the look-alikes. "We need a national approach without a question," testified Fahner in Springfield on December 10. He said that "if we're going to be successful, [we] have to have uniformity . . . otherwise it is a band-aid approach." Fahner said that Illinois might not want to wait until a federal approach is adopted before enacting legislation.

The 82nd Illinois General Assembly is considering three bills dealing with look-alikes. All were introduced last October, but none appears to be based on the DEA's model act. Two of the three have identical provisions: S.B. 1241 (Sen. John Maitland, R., Bloomington) and H.B. 1933 (Rep. Frank Watson, R., Greenville). The third is H.B. 1988 (Rep. Harry "Bus" Yourell, D., Oak Lawn).

Each of the two Illinois approaches has something not found in the other; the DEA model act has everything contained in them and some other provisions besides.

The version in both S.B. 1241 and H.B. 1933 would prohibit distribution of or possession with intent to distribute noncontrolled substances if the distributor either represented the substance as a controlled substance or distributed it under circumstances where he reasonably should know it may be used as a controlled substance. Any violator would be guilty of a Class 3 felony and could be fined a maximum of $15,000 (and imprisoned 3-5 years).

H.B. 1988 prohibits the manufacture of "counterfeit drugs" as well as their distribution and possession with intent to distribute. But rather than base the illegality of these actions on the representation or intent of the manufacturer or distributor, H.B. 1988 bases the illegality on the resemblance of the drug or its packaging to a controlled substance. Any violation is a Class 4 felony (1 to 3 years in prison and/or a maximum fine of $10,000).

The DEA model act would prohibit everything the Illinois bills would: the manufacture, distribution, or possession with intent to deliver of an "imitation controlled substance." It would also include both criteria of illegality found in the Illinois bills — representations of the distributors and appearance of the drug. Furthermore, the model act would prohibit possession with intent merely to use the drug, but with a lower penalty, and would prohibit advertising look-alikes. It would impose a higher penalty for distribution to a person under 18 than for other distribution.□

Julie A. Dutton is a research associate with the Illinois Legislative Council's science unit.

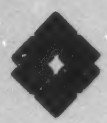
Legal studies at Sangamon State

The academic Legal Studies Program at Sangamon State offers courses leading to the bachelor and master of arts degrees in legal studies. Sangamon State University is one of a limited number of universities in the nation which offer legal studies as a major. Currently, in 1982-83, there are approximately 90 students enrolled in the program. Students in legal studies take courses which increase their knowledge of the law and the legal system. The program differs from traditional law school studies in that the technical aspects of the law do not form the primary core of the curriculum. The course work is designed to include a broader perspective which emphasizes the role of law in society and policy issues which underlie the law.

All students enrolled in legal studies are required to take a series of core courses which emphasize legal research and writing skills as well as law-making processes and institutions. The curriculum also includes liberal arts courses. The program offers several substantive law courses such as juvenile law, school law, constitutional law and administrative law. These courses are also designed to serve the needs of students from other university programs.

Undergraduates, under supervision of faculty, study legal institutions and gain practical experience in law-related clinical education placements. Students work in law offices, government agencies and advocacy institutions. Graduates of the program are employed in government and private industry positions which require knowledge of the law. Some program graduates continue their education by attending law school. The legal studies program is approved by the American Bar Association as a legal assistants program.

The Legal Studies Program faculty is diverse and highly qualified. The faculty members who teach on a full-time basis currently include six attorneys and two political scientists. Some courses are taught by practicing attorneys from the Springfield community and by faculty from other academic programs. The legal studies faculty use the Center for Legal Studies to support research and writing projects and to engage in instructional projects which increase the public's knowledge of law and the legal system in Illinois.



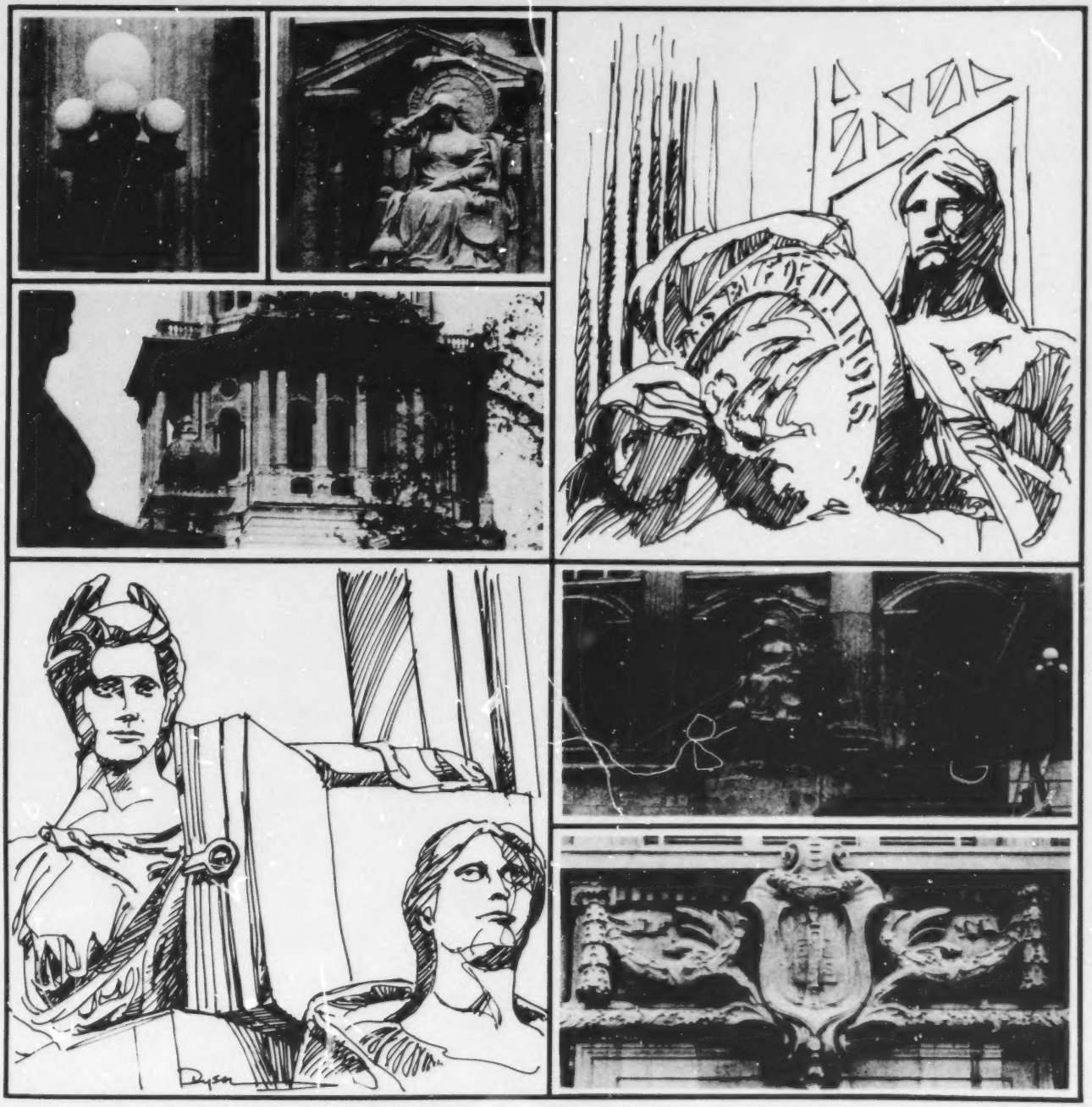
The Center for Legal Studies

The Center for Legal Studies was developed to focus research and service efforts on the legal system of Illinois. The center's fundamental objective is to contribute to the better understanding and improvement of the Illinois legal system in ways accessible to scholars, policymakers, practitioners and the general public. The center fulfills its mission through the performance of four functions: training, law-related education, research and public service.

The center's activities in these areas address significant issues and problems in the state. The center conducts in-service training for court personnel and those who must deal regularly with the courts or their alternatives. Law-related education activities, such as the sponsorship of teachers' institutes and the development of educational materials and publications, are designed to foster and improve teaching about the law. Research projects address the theoretical and conceptual aspects of public issues in the Illinois legal system. The center's public service and public education projects focus on ways to contribute to the improvement of the legal system and public awareness of the law through preparation of reports on specific issues, and through radio programs, conferences, public information brochures and other activities.

Among the areas of center concern are criminal and juvenile justice, the courts and judiciary, alternatives to courts, family and child welfare law and jurisprudence. A number of center projects have attracted external funding for intensive effort in many areas.

The functions and activities of the center provide Sangamon State University faculty, staff and students with many opportunities to supplement academic program interests. The center works with the academic programs and other public affairs centers to provide educational experiences for students. Graduate and undergraduate students have assisted in the development and implementation of training and research projects conducted by the center. The Center for Legal Studies offers a limited number of graduate assistantships to students enrolled in legal studies and other programs at Sangamon State.



Published By
Illinois Issues
and Center for Legal Studies
Sangamon State University
Springfield, Illinois